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PRESERVATION OF AMERICAN INSTITUTIONS *

WE are gathered here this morning in a corporate act of worship. We have come to assist at the Holy Sacrifice of the Mass, to adore God and to ask His blessing on our efforts to administer justice. This is the Red Mass, whose origin is found in the ancient traditions of the Sacred Roman Rota and which history discovers in 13th Century France and 14th Century England.

As the scarlet robed judges of the king's bench in the days of Henry the First knelt in humble supplication before their God, so do we attorneys, judges and members of the legislative and executive branches of the government kneel to ask that same God for the grace to recognize our obligations and for the grace to fulfill them. God grant that we may receive these graces; God grant that we may cooperate with these graces.

But what are these words that come so easily to the tongue: "God grant"? Are they a mere figure of speech? Are they the empty shell of a faith long since dead? For Nikita Khrushchev, Russia's Man-of-the-Year for 1957, that is just what they are! "God grant", he once said (and it sounded like a prayer,) "God grant that every communist be able to fight like Stalin fought". But then he hastily explained "We say the name of God but that is only a habit. We are atheists."

Americans owe a debt of gratitude to Krushchev. We should be grateful for his orders which rocketed Sputnik into space

* Sermon delivered by the Very Reverend Joseph T. Tinnelly, C.M., Dean of St. John's University School of Law and Editor of *The Catholic Lawyer* on the occasion of the Red Mass sponsored by The John Carroll Society, St. Matthew's Cathedral, Washington, D. C., Sunday, January 26, 1958.

and awakened a free world to its terrible danger. But we owe Krushchev a greater debt of gratitude for words which should awaken us to an even more terrible danger: the danger that we may continue to say the name of God through habit when in effect we shall have become a godless nation without even the safeguards that acknowledged atheism and acknowledged atheistic policies would afford us.

Historically, of course, we are a religious people whose institutions presuppose a Supreme Being. The Supreme Court has often taken judicial notice of this fact. Our jurisprudence is deeply rooted in and has helped to develop our Judaeo-Christian civilization. The American Declaration of Independence was an appeal to the Law of Nature, to Nature's God and to the Rights with which their Creator has endowed all men. For generations we have stamped "'In God We Trust" on our coinage and recently we have made these sacred words our national motto. Sessions of the Congress are opened with prayer, the armed forces have their chaplain corps, millions of citizens attend religious services weekly and other millions profess some sort of a belief in God however inchoate and hazy it may be.

But the laws of inertia are often as active in social forces as in physical forces. Ideals, principles and policies which were originally based on the love or fear of God may well be continued because of custom, convention or emotion. These motives may help to preserve a façade of ideals and principles but in a crisis they will betray us.

Unless our national ideals and principles are founded on a belief in God and upon a concomitant sense of obligation to obey God's law we shall be obliged to shift our national policies and objectives from day to day, from hour to hour, until we are forced back upon the stark, ruthless, purely pragmatic materialism which Russian has frankly adopted.

Our Secretary of State has well said that we do not wish to base our national policies upon atheistic materialism. But we will delude ourselves if we entrust to a nation which lacks

moral character the execution of policies based on principles of morality. In formulating policies upon such a scale the Department of State will have discharged its duty, but we the citizen body will have failed in our responsibility if we have let die the moral character which is necessary to execute such high minded policy.

Thank God that religious life in America is still vigorous, that Americans as a whole have a sense of justice and injustice which transcends personal interest, that our national policies reflect the ideals of a moral and God-fearing people.

But let us have no false illusions. For all too many millions of our people " God bless you " is no more than a synonym for " Gesundheit "; God is a harmless though often useful myth. And for a small but significant and highly vocal minority, religion is a racket; clergymen are charlatans; morals are the shackles fashioned by an ancient and decaying civilization which brave young people will courageously cast aside.

Here then is the danger—that godlessness and lawlessness may spread unperceived like a subtle but fatal poison through the body politic. We instinctively look to our churches and our homes for an antidote to this poison but all too often we look in vain. The churches of America have the least effect on many of the children who need them the most. Our family courts give eloquent testimony of the failure of many homes to inculcate any semblance of moral or religious training. Homes! Often cesspools of iniquity presided over by men and women unworthy of the name of father or mother.

Yet if church and home have failed so often, where shall we turn for help? To our public schools? Some of them are valuable and useful allies. Many teachers have achieved encouraging success in the establishment of satisfactory patterns of behavior.

But there are schools—and the number is increasing—where disorder and defiance of authority are so rampant that robbery, theft, rape, mayhem, assault and battery are by no means rare; there are schools to which grand juries have rec-

ommended that policemen be regularly and permanently assigned; and there are other, and many more, schools where violence is not prevalent but where apparent conformity to convention is often a cloak for gross immorality and base dishonesty.

What kind of citizens, we may ask, will the products of such schools become? It is a terrifying thought. Generations of children in secular schools, public and private, have been robbed of their religious faith and left bereft of any solid moral training or motivation. The growth of secularism in America has reached the stage where it is a threat to our national institutions, to the stability of our government.

We can, of course, teach ethics of a sort in our public schools. But what motivation can we give for conformity to the rules of ethics? Acceptance by the group? An inner feeling of satisfaction? Avoidance of entanglement with law enforcement agencies? All of these may be useful subsidiary motives, but none of them is likely to be effective where temptation is strong and detection unlikely.

Yet, unless we turn this country into a police state we must continue to rely upon the majority of people to lead decent, moral lives, lives which cannot be regulated by police, lives which can be policed only by conscience. It is not impossible, of course, for some individuals to behave morally uninfluenced by any religious considerations whatsoever. But the number of such people is small and their influence negligible because their position is illogical.

They speak vaguely of the dignity of man. What dignity does man have if he is nothing but an animal in a highly advanced state of evolution? What reverence should we have for the individual if he differs only in degree from a rat or a dog? Why should we condemn Nazi Germany for experimenting on human beings if such creatures have no other purpose in life or destiny hereafter than the rest of the laboratory animals? Why should we hesitate to solve our problems of overpopulation by reducing those populations by disease or bullets as we would thin out a herd of deer?

To ask these questions in America is to answer them. Our institutions are based upon the assumption that man is sacred because he has an immortal soul and an immortal destiny, that he is obliged by the implications of his immortal destiny to obey the laws of God, Who created him and Who established natural and divine laws for his government.

America needs a leaven of religious men and women to mould public opinion; to establish or protect standards, patterns, habits of public behavior; to bring to our legislative halls, to our courts of justice, to our executive and administrative agencies and tribunals an appreciation of the great principles upon which this government was founded but which can only continue to flourish among a people who are basically religious.

It is essential, therefore, that religion in America flourish and grow. Yet how shall this be accomplished?

It is not, of course, a matter for active government intervention. In a pluralist society such as ours, we want no establishment of religion any more than we want a prohibition of the free exercise thereof. We are agreed that God has not conferred the gift of infallibility upon our Congress. We are determined, therefore, that the public schools shall offer no official religious instruction.

Moreover, the McCollum Case has forbidden the use of public school classrooms by religious sects to teach religion on a voluntary basis and with the consent of parents who desire such instruction for their children.

The sweeping language of the McCollum Case has been modified by the Zorach Case, which permits public school authorities to cooperate with religious denominations in certain released time programs. Yet even this is insufficient.

An hour a week of religious instruction, precious as it is, cannot be the complete answer to character formation. Instruction is necessary, but it must be supplemented by moral guidance, by training in self-discipline, by immersion in an atmosphere of peace and order and justice, but most of all by an

orientation of all activity to God, to adoration of God, to love of God, to respect for the law of God, and hence to respect for lawfully constituted authority.

I dare to say that the most important constitutional problem to face this or succeeding generations is not the delineation of the respective jurisdictions of Federal and state governments, not the protection of the individual against a tyrannical majority, not segregation, not evidentiary rules,—important—essential as all of these things concededly are.

The greatest constitutional challenge to us as lawyers is this: how shall religious groups be permitted to continue their great role as the leaven of society unhindered by Federal or state government?

Perhaps the answer lies in a greater extension of private education. Nor should the word private in this context be limited to parochial or sectarian education. Even in great private universities like Harvard the need for religion is being felt. At the last Harvard Commencement, the word religion was mentioned for the first time in forty years.

I do not mean to attack the concept of public education or belittle the real contributions of our public school system. Concededly the scope of this system is limited by our Constitution and by practical considerations which must arise in any pluralist society.

We must ask ourselves: How can we preserve the liberty of parents to exercise their religious freedom, to insure the religious formation and education of their children in schools of their own choice?

It is easy to say that parents now have a right to send their children to any school they choose, but this is an illusory right. It is illusory to the extent that our tax structure makes no provision for relief for those parents who pay for the education of their children in private schools. That right is illusory to the extent that it can only be exercised by those who can afford and are willing to submit to a double educational tax.

The constitutional problems are concededly enormous, but they are not insoluble. The rights of veterans to choose their

own schools were adequately safeguarded under the Serviceman's Readjustment Act without need for constitutional amendment.

The most difficult part of our task as lawyers may be that of persuasion: persuasion of our fellow citizens that our country needs to provide for the education of future generations of God-fearing, law abiding citizens; that justice demands that parents be relieved of double taxation; that this is not a Catholic scheme or a Lutheran or Episcopalian or Jewish scheme to raid the treasury.

Rather is it a practical plan for the safety and preservation under God of our American institutions.

We must not fail! We dare not fail! For if we fail, we shall have lost all we hold dear, all for which our fathers and our forefathers fought and died. There may continue to be a people and a government in the area now occupied by the United States of America, its name and flag may be identical with those of our beloved country, but it will not be the land which Lincoln loved. For if we fail, this nation under God shall have perished from the earth.

A COMPARATIVE STUDY OF IGNORANCE IN THE RULES OF LAW AND IN THE CODE OF CANON LAW

IGNORANCE in Canon Law is considered both as a fact and as a presumption. In both ways it is mentioned in Canon 16.

Ignorance in regard to law and in regard to fact is a favorite topic among commentators on Canon Law.[1] There has been a considerable retreat from the rigid concept of ignorance found in Roman Law. This is due mainly to the large body of laws which have universal territorial application, but which, in many cases, are enacted for specific groups. Today the knowledge of the whole Canon Law is not found at times even in those whose business it is to seek the law and apply it. Thus, in some cases, at best presumptive knowledge must be accredited to those whose duty it is to administer the law, and their responsibility for acts performed or omitted in ignorance must be judged by their corresponding responsibility to obtain sufficient knowledge to administer the law properly.[2]

Ignorance in Canon Law can be accepted in several ways. There is still the strict concept of ignorance with its rigid concept in regard to invalidating laws in canon 16, § 1, but even this is tempered by possible exception. Ignorance of actual law and penalties is now accepted as an excuse, although the presumption of knowledge is still strong. The presumption of knowledge is likewise strong in relation to one's own acts and in relation to another's public acts. No such presumption exists in regard to another's private acts.[3]

[1] Cf. Suarez, *Tractatus de Legibus ac Deo Legislatore*, (Napoli, 1877), Lib. V, cap. XII; Michiels, *Normae Generales Juris Canonici*, (Parisiis-Tornaci-Romae, 1949), Vol. I, pp. 442–462; Aertnys-Damen, *Theologia Moralis*, (Buscoduci, 1929), Vol. I, no. 162, 180–182.

[2] Cf. can. 2199: *Imputabilitas delicti pendet . . . vel ex eiusdem culpa in ignorantia legis violatae aut, etc.*

[3] Can. 16, § 2.

It will be, therefore, interesting to study the Rules of Law which state both the definite admissibility or non-admissibility of ignorance in regard to law and in regard to fact. It will be equally interesting to see where a Rule of Law will set up a presumption of knowledge or ignorance.

While Rules 13 and 47 are separate Rules of Law, they do in many cases join to give a complete view of their application to modern Canon Law. Hence, too, while these Rules will be considered separately, comment will inevitably be interchangeable.

Rules 13 and 47 will be discussed in regard to their explanation; in regard to the pertinent canon; their application to the pertinent canon and, where possible, their application to other canons.

I. Rule 13. *Ignorantia facti, non iuris, excusat.*

A. *Explanation of the Rule.*

Rule 13 is a statement of a long recognized principle of law. It consists of two parts. Both parts are a clear statement of the force of ignorance in legal matters.

Rule 13 is found in Roman Law in exactly the same way in which it was originally accepted in Canon Law. The text of the Rule, however, in Roman Law is different. The Rule as given by the jurist Paul reads: *Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*[4] The Rule of Law as stated in Roman Law did not have as universal an application as it would seem to have. Minors in Roman Law were not presumed to know the law. Similar lack of knowledge of law was in certain cases recognized in women. Aside from these exceptions, the knowledge of law was accredited to everyone. There was, however, a tendency to excuse soldiers and those living outside the cities.

Ignorance, not of law, but of fact was generally presumed. None the less, there were times in Roman Law when the knowledge of facts was presumed. This presumption was made when the fact was generally known or could be easily

[4] D. 22, 6, 9. Cf. also C. 1, 18, *de iuris et facti ignorantia.*

known.[5] The jurist Paul approves the knowledge which is the result of the endeavor of neither the most curious person nor the most negligent. Average diligence suffices.[6] The same approval is given by the jurist Ulpian.[7] Hence, public facts were presumed to be known in Roman Law.

The jurist Papinian has a statement in regard to ignorance of law which should be mentioned. This statement has carried its force into Canon Law. Papinian says that the ignorance of law does not result in benefit but that it can be alleged to ward off damage.[8] Profit, therefore, cannot be retained if it has been gained in ignorance of the law. Damage, however, which has been suffered because of this ignorance can be claimed.

The ignorance understood in Rule 13 is invincible ignorance.[9] If ignorance of either law or fact can be normally overcome, it cannot be alleged as an excuse. This is of great importance because the diligence required to conquer ignorance of either law or fact depends on many factors. Diligence in regard to law will not be required of laymen in the same degree that it would be required in a cleric. Similarly, the same diligence in regard to fact will not be required in an entire community when only a few are eligible to elect.

In regard to ignorance of fact, there is a decretal of Pope Innocent III which can be suitably studied. The Pontiff wrote to the Archbishop of Canterbury regarding elections stating that an illegitimate person can be canonically postulated but not elected.[10] There is some doubt whether a penalty was actually inflicted in this decretal, but the Pontiff

[5] *Quid enim si omnes in civitate sciant, quod ille solus ignorat?* D. 22, 6, 9.

[6] *Loc. cit.*

[7] D. 22, 6, 6.

[8] *Iuris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet.* D. 22, 6, 7.

[9] Reiffenstuel, *Jus Canonicum Universum,* Vol. VII, *Tractatus de Regulis Juris,* (Parisiis, 1870), R. XIII, no. 9.

[10] C. 20, X, *de electione et electi potestate,* I, 6.

clearly indicates that considerable effort must be made by electors to acquire sufficient knowledge of candidates for office. This decretal is sometimes suggested as an objection to the Rule that ignorance of fact excuses from penalties. The answer to this objection is the reply that if sufficient knowledge is not had in order to act, suitable penalties can be inflicted because the ignorance is not invincible.

Rule 13 has application only in the external forum. Hence, no question of sin is directly involved. The multitude of laws makes it extremely difficult to place a moral obligation on everyone to obtain complete knowledge of the existence of pertinent laws. This is a practical proposition. If one is ignorant of the law, he may not be qualified to allege this as an excuse in the external forum, but he is not necessarily guilty of sin. The same statement can be made in regard to ignorance of facts.

Rule 13, as already indicated, consists of two parts. A few words will be said of each part separately.

The ignorance of fact stated in Rule 13 is the ignorance of an alien fact. This means that the actions of others are not known generally, either because of their number or because of their obscurity. This is a valid presumption, as everyday experience teaches. The same ignorance of fact cannot be alleged as an excuse in regard to one's actions. These actions are facts presumed to be known. Some exceptions, of course, can be made cautiously if the facts involved occurred long ago or if circumstances are such that it can be prudently assumed that oblivion covers one's past actions. The presumption based upon the knowledge of one's own past actions is a valid presumption.

The ignorance of law stated in Rule 13 refers to any kind of law. No law, therefore, either divine or human, ecclesiastical or civil, universal or particular, is excluded. Even law which is the result of custom is included. This obviously covers a field with which comparatively few will be sufficiently conversant. None the less, in the external forum, normally no ex-

cuse can be accepted if it is based on ignorance of the pertinent law. There is really no other position to take in the matter of knowledge of law. Once the question of conscience is satisfactorily solved, each legislator must presume that his laws are known. Therefore, responsibility before a court can be legitimately assumed. Where, however, ignorance does exist and can be successfully demonstrated, it can be accepted to repair damage, but it should not be accepted as a basis for gain. The statement of Papinian mentioned earlier has equal force in Canon Law.

An objection to this presumption of knowledge can be found in a decretal of Pope Boniface VIII.[11] In this decretal, the Pontiff states that penalties do not bind those who are ignorant of them. In a sense this objection is valid, thus creating a field where Rule 13 would not apply. A detailed study of this idea will be made later. But in regard to the overall presumption of knowledge of law as indicated in Rule 13, the decretal of Pope Boniface VIII is not destructive. A penalty in the law is not the law itself. Reasons can be advanced why one actually ignorant of the law should not be penalized for his transgression, but this does not mean that knowledge cannot be presumed.

Reiffenstuel states that Rule 13 suffers an exception when laws are not clear or when they are ambiguous.[12] This possible exception is of little moment today, for canon 15 states that doubtful laws do not bind.[13] The reason, however, upon which Reiffenstuel based his contention is worthy of note. Reiffenstuel draws a comparison between the knowledge of the learned and the knowledge to be presumed in all. If the learned do not know, or if they are in controversy, no sure knowledge can be expected of others.

[11] C. 2, *de constitutionibus*, I, 2 in VI°.

[12] *Op. cit.*, Vol. VII, R. XIII, no. 22.

[13] *Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent.*

B. *The Pertinent Canon.*

Can. 16, § 1. *Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expresse dicatur.*

Rule 13 is cited under the first paragraph of canon 16, but not under the second paragraph of the same canon. While equal application can be made to both paragraphs of canon 16 if the second part of Rule 13 is alone considered, this is not so of the entire text of Rule 13. Hence, the explanation of canon 16 will be considered according to the way Rule 13 is to be applied.

Canon 16, § 1 lays down the statement that no ignorance of invalidating laws [14] will excuse from their observance and force unless an exception is made in the law itself. Every kind of ignorance is included. The effect of this statement is to repel any excuse of ignorance unless this excuse is openly admitted. Good faith, therefore, or inability to learn the law are not excuses.

The reason for the almost complete rejection of ignorance of invalidating laws is founded upon the character of such laws. Invalidating laws are usually concerned directly with the public or common good. They may, for instance, directly touch the social organization or may be directed at conserving the dignity of a state of life. Whatever their first purpose may be, they are beyond the influence of subjects.[15]

Canon 16, § 1 provides for exceptions to the rule that ignorance does not excuse from invalidating laws.

The first exception that can be made concerns a penal invalidating law. As Maroto says [16] if the invalidating law is primarily penal, ignorance of the penalty will excuse from the law. Such is not the case if the invalidating law is not prima-

[14] This term is used to include both "invalidating" and "disqualifying" laws.

[15] Cf. Van Hove, *De Legibus Ecclesiasticis,* (Mechliniae, 1928), 240–241 citing the opinions of Del Guidice and Michiels.

[16] *Institutiones Iuris Canonici,* (Romae, 1921), tom. I, p. 243.

rily penal but primarily invalidating. Penal laws which do not invalidate acts are not to be considered under the first paragraph of canon 16. They are properly considered under the second paragraph of this canon.

Van Hove says canon 209 is an exception to the law of canon 16, § 1. This is the canon which supplies jurisdiction in common error and in positive and probable doubt.[17] Whether or not this is an actual exception depends on the identification of ignorance and error. Kelly, for instance, identifies the two;[18] Kearney[19] and Miaskiewicz[20] deny this identification. The latter authors have the support of Reiffenstuel in his commentary on Rule 13.[21] However, since canon 16, § 2 says *ignorantia vel error* it is difficult to see why ignorance should not include error in the first paragraph of this canon. This would constitute canon 209 as an exception to canon 16, § 1.

The final exception to be considered is the law in canon 2247, § 3. There a confessor, ignorant of a reservation, validly absolves from a censure provided this censure is not *ab homine* or in the highest degree reserved to the Holy See.[22] This exception removes a disability from the confessor. His ignorance of the disability does not hinder him from acting validly. However, canon 2247, § 3 is not a complete removal of disability. The restrictions found in this canon must be observed. Partly, then, the rule laid down in canon 16, § 1 is definitely applied. Other exceptions could be mentioned[23]

[17] *In errore communi aut in dubio positivo et probabili sive iuris sive facti, iurisdictionem supplet Ecclesia pro foro tum externo tum interno.*

[18] *The Jurisdiction of the Simple Confessor,* (Washington, 1927), pp. 104–105.

[19] *The Principles of Delegation,* (Washington, 1929) pp. 132–135.

[20] *Supplied Jurisdiction according to Canon 209,* (Washington, 1940), pp. 152–156.

[21] *Op. cit.,* Vol. VII, R. XIII, no. 2.

[22] . . . *absolutio censurae valet . . . reservata.*

[23] E.g., cc. 991, § 1; 1114; 2249, § 2.

but the exceptions stated will serve to show how canon 16, § 1 is to be understood.

Can. 16, § 2. *Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum alienum notorium generatim non praesumitur.*

In the second paragraph of canon 16, ignorance of law and ignorance of fact are considered. Ignorance and error are taken as one. This ignorance can be either in regard to the law itself or in regard to the penalty attached to the law. Ignorance of fact, as far as Rule 13 is concerned, regards either one's own actions or the public acts of another. The remaining part of canon 16, § 2, not cited above,[24] is better stated and explained in the exposition of Rule 47.

Rule 13 is not cited in the footnote to canon 16, § 2. This is probably because the possible excuse of ignorance is not directly touched. The law involved in canon 16, § 2 deals directly with the rejection of a presumption. Ignorance of law is not presumed either in regard to the law itself or in regard to the penalty in the law. Ignorance of fact is not presumed in regard to one's own actions or in regard to the public acts of another. It is manifest, however, that the rejection of the presumptions of ignorance either of law or fact is of importance only when ignorance is alleged as an excuse. Hence, it is entirely proper to consider Rule 13 in connection with canon 16, § 2.

The rejection of ignorance as an excuse is not to be considered universal. This rejection is qualified by the term *generatim*. A judge, therefore, is competent to accept ignorance as an excuse. Naturally, an option is not considered here and, therefore, not conceded, but the judge has it within his power to weigh ignorance as an excuse. When, in point of fact, ignorance can be accepted as an excuse will depend entirely upon circumstances. Such circumstances, however, cannot be ad-

[24] . . . *circa factum alienum non notorium* [*ignorantia vel error*] *praesumitur, donec contrarium probetur.*

mitted when specific knowledge is required by reason of one's office. A Bishop, Vicar General or pastor can scarcely plead ignorance as an excuse.

It will help to know that ignorance can be offered and accepted as an excuse more easily in matters of particular law than in universal law.[25]

The ignorance or error contemplated in canon 16, § 2 concerns any law, universal or particular, written or unwritten. For practical purposes invalidating laws are excluded from consideration in canon 16, § 2. Definite legislation regarding these laws is already had in the first paragraph of this canon. All the laws of the Code, therefore, fall under the provisions of canon 16, § 2. The same is true of all particular laws whether derived from the local Ordinary, a provincial or national Council, or from the extraordinary provisions of the Holy See. All particular laws arising from legitimate custom are likewise included. Particular laws regarding travellers are not excluded. Hence, it may be necessary for a traveller to learn what particular laws will bind in the locality he intends to visit. It is, of course, assumed here, especially in regard to particular laws binding travellers, that the law itself is valid legislation.[26] If this is not so, no question of ignorance arises. There is no doubt that the rejection of the presumption of ignorance of law is really a broad assumption. But it is a valid assumption in the external forum, where the legislator has a right to believe that his law is known. In the internal forum, ignorance of law is a valid excuse. But since Rule 13 is not applicable to the internal forum, this will not be considered. Moral theologians expatiate sufficiently on this topic.[27]

[25] Cf. Van Hove, *op. cit.*, p. 245.

[26] Cf. Hammill, *The Obligations of the Traveler according to Canon 14*, (Washington, 1942), pp. 121–125; Roelker, "The Traveler and the local Statute"—*The Jurist*, (Washington, 1941–) vol. II, p. 111.

[27] Cf. e.g., Noldin, *De Principiis Theologiae Moralis*, (Oeniponte, 1920) p. 202; Merkelbach, *Summa Theologiae Moralis*, (Parisiis, sine anno), vol. I, p. 321; Aertnys-Damen, *op. cit.*, tom. I, p. 82.

Ignorance of the penalty stated in canon 16, § 2 is likewise concerned with any kind of penalty. Fortunately, however, the Code in several canons gives a satisfactory outline of the consideration of ignorance as it is concerned with penal law. These canons will be examined shortly. A word must first be said of ignorance regarding the penalty itself.

Canon 2202, § 2 states that ignorance of the penalty alone, while reducing imputability, does not take it away entirely.[28] This means that some punishment can be imposed if the law which has been violated is known, but the penalty attached to this law is not known. Sole says there is an implicit knowledge of a penalty.[29] This would suffice for the imposition of a mitigated penalty. This opinion can be accepted, for normally one would expect some penalty for the violation of law.

The fundamental law regarding the imputability of crime is found in canon 2199. There the law states that imputability depends upon *dolus* of the delinquent or on the guilt arising from ignorance of the law violated or from the omission of sufficient diligence.[30] Therefore, the canon continues, any cause which increases, decreases or removes *dolus* or guilt at the same time increases, decreases or removes imputability.

Of the various causes which can decrease or remove imputability there is concern here only with ignorance of the law.

Canon 2202, § 1 states that inculpable ignorance is a cause for removing imputability.[31] Therefore, if ignorance of the law is successfully demonstrated as inculpable, it must be accepted as an excuse and no penalty can be imposed. This has nothing to do directly with the validity of the act performed. All this means is that ignorance of the law, successfully dem-

[28] *Ignorantia solius poenae imputabilitatem delicti non tollit, sed aliquantum minuit.*

[29] *De Delictis et Poenis,* (Romae, 1920), p. 23.

[30] *Imputabilitas delicti pendet . . . ex eiusdem culpa in ignorantia legis violatae. . . .*

[31] *Violatio legis ignoratae nullatenus imputatur, si ignorantia fuerit inculpabilis.*

onstrated as inculpable, releases one from the application of penal power. The Code moreover considers a state between complete imputability and its complete absence. Thus, according to the degree of imputability, penal law can be applied.[32] This at times will be a wide range, and its prudent determination will be the work of a judge or tribunal. But it is evident that at least some excuse of ignorance must be accepted when culpability is not complete. The consideration of this graduated scale of culpability will have its place mostly in matters of vincible ignorance, where *dolus* is removed but some guilt remains.[33] Ignorance arising from insufficient diligence would be an example.

Canon 2229 is a guide in determining the force of ignorance of law or penalty. The first paragraph of this canon rejects affected ignorance even where knowledge is required in penalties already contained in the law.[34] In the second paragraph of this canon, allowance is made for ignorance when full knowledge is required.[35] Ignorance of the law or penalty is rejected even in matters where full knowledge is not required if this ignorance is crass or supine. Otherwise ignorance excuses from censures contained in the law but not from vindictive penalties similarly established.[36]

Much more could be profitably discussed regarding the application of the penal canons cited here, but enough has been said regarding the interpretation of canon 16, § 2.[37]

[32] *Imputabilitas minuitur plus minusve pro ignorantiae ipsius culpabilitate.* —*loc. cit.*

[33] Cf. Sole, *op. cit.*, p. 23.

[34] *A nullis latae sententiae poenis ignorantia affectata sive legis sive solius poenae excusat,* etc.

[35] *Si lex habeat verba . . . scienter . . . aliave similia quae plenam cognitionem ac deliberationem exigunt, quaelibet imputabilitatis imminutio . . . eximit a poenis latae sententiae.*

[36] *Ignorantia . . . si fuerit crassa vel supina a nulla poena latae sententiae eximit; si non fuerit crassa vel supina, excusat a medicinalibus, non autem a vindicativis latae sententiae poenis.*

[37] Cf. Noldin, *De Poenis Ecclesiasticis,* (Oeniponte, 1921), pp. 24–25; Cappello, *De Censuris,* (Taurinorum Augustae, 1925), p. 52; Swoboda, *Ignorance in Relation to the Imputability of Delicts,* (Washington, 1941), pp. 131–169.

The meaning of ignorance regarding one's own actions does not require much explanation. It is taken for granted normally that every one knows his own deeds. Hence, as stated in canon 16, § 2, ignorance *circa factum proprium* is not generally presumed. Allowance, of course, must be made for actions which occurred long ago or which were not considered of great importance. Van Hove suggests that the same allowance should be made for a man who is engrossed in many affairs.[38]

Ignorance regarding the public acts of another is equally rejected. The term *notorium* in canon 16, § 2 should be interpreted according to the definition found in canon 2197, 3°. There a crime notorious with the notoriety of fact is defined as one publicly known and committed in such circumstances that it cannot be concealed.[39] Of course, canon 16, § 2 does not consider merely crimes, but the concept of notoriety can well be applied to the phrase *circa factum alienum notorium*. Michiels[40] mentions that even alien facts public with the notoriety of law are understood in canon 16, § 2.[41]

C. *The Application of Rule 13 to Canon 16.*

Indications of how Rule 13 can be applied to canon 16 have already and unavoidably been given in the preceding pages. What follows now is the textual application to see where and to what extent Rule 13 can be used to interpret canon 16 properly.

Canon 16 is divided into two paragraphs. These two paragraphs cannot be entirely considered together in connection with Rule 13. Hence, separate application must be made, just as above separate commentary was necessary to explain this canon.

[38] *Op. cit.*, p. 245.

[39] *Notorium notorietate facti, si publice notum sit* [*delictum*] *et in talibus adiunctis commissum ut nulla tergiversatione celari . . . possit.*

[40] *Op. cit.*, vol. I, p. 354.

[41] Cf. c. 2197, 2°.

In order to apply Rule 13 to canon 16, § 1 it is first necessary to sever the Rule into parts: ignorance of law does not excuse; ignorance of fact does excuse. This latter half of Rule 13 has no application at all to the first paragraph of canon 16.

Rule 13 in so far as it says that ignorance of law does not excuse has a direct and immediate application to canon 16, § 1. The only difference between the Rule and the canon is that the canon provides for exceptions. These exceptions must be demonstrated. They cannot be assumed. Canon 16, § 1 does not recognize some of the exceptions admitted by earlier canonists and commentators on Rule 13. Thus, soldiers and women are not presumed in canon 16, § 1 to be legally exempt from the knowledge of law and, therefore, not subject to its prescriptions. With the diffusion of knowledge every one today is expected to know the law.

The assurance which Rule 13 gives in interpreting canon 16, § 1 is of great assistance in determining the validity of acts. Canon Law today does not consider every act contrary to the law as invalid. Simple prohibitions do not penalize with invalidity.[42] Hence, the legislator separates prohibitory laws from invalidating laws. To only the latter class of laws can Rule 13 be applied in canon 16, § 1.

The obvious application of Rule 13 to canon 16, § 1 is in regard to diriment matrimonial impediments. There is no need to cite examples, as this is part of the every-day work of the canonist.

Once it is understood that Rule 13 is applied directly in the interpretation of canon 16, § 1, there will be no difficulty in realizing that the legislator can make exceptions. Once again, though, let it be said that such exceptions must be demonstrated.

The same ease with which Rule 13 can be applied to canon 16, § 1 is not found in relation to the second paragraph of this canon. If the latter part of this paragraph be omitted temporarily, to be discussed under another Rule, it is found that

[42] Cf. c. 11.

canon 16, § 2 deals with the presumption of ignorance of law and of fact. Hence, both parts of Rule 13 are considered but not in a direct or immediate application. Canon 16, § 2 is so constructed that a rejection of the presumption of ignorance is made. Naturally, this ignorance will be in relation to law or fact and, therefore, both law and fact are grouped under the same rejected presumption. This would seem to be a denial of the validity of Rule 13 in so far as it places ignorance of fact as an excuse. In reality, however, ignorance of fact is today in Canon Law judged as it was in the days of earlier commentators on Rule 13.[43] Ignorance of fact in Rule 13 means ignorance of another's non-public acts. It does not mean ignorance of one's own acts or of another's public acts. In the latter sense the presumption of ignorance is rejected in canon 16, § 2.

With this in mind, canon 16, § 2 can be reworded to say that ignorance or error of law or of penalty does not excuse; ignorance of one's own acts or of another's public acts does not excuse.

If the canon is thus reworded, it will be seen that one part of Rule 13, viz., ignorance of law does not excuse, is now directly at hand in the interpretation of canon 16, § 2. The other part of the Rule, viz., ignorance of fact does excuse, is not applicable at all. It would not be right to say that the Rule is denied here, for the facts about which discussion is offered are not contemplated in Rule 13. The facts referred to in that part of canon 16, § 2 which is under discussion do not fall under any Rule. The assertion is made in the law independently of any Rule. The law merely states what is obvious to any one. It would go against all reason to presume that personal facts and alien public facts are unknown.

From the argument outlined above, it may be stated that Rule 13 is not universally applied to the law of the Code. The extension of the application of Rule 13 is limited by the clause in the first paragraph of canon 16[44] and by a qualifying ad-

[43] E.g., Reiffenstuel, *op. cit.*, vol. VII, R. XIII, no. 11.

[44] *Nulla ignorantia . . . excusat, nisi aliud expresse dicatur.*

verb in the second.[45] There is no doubt that more latitude is conceded in the second paragraph than in the first. This is of considerable importance. A judge, for instance, can decide to accept ignorance of law as a complete or partial excuse whenever no invalidating law is involved.[46] Such latitude is not granted in regard to invalidating laws. There, the exception must be stated in the law itself. If this exception is not found in the law, the act will be invalid.[47]

Rule 13 is not applied to other canons of the first book of the Code of Canon Law.

II. Rule 47. *Praesumitur ignorantia, ubi scientia non probatur.*

A. *Explanation of the Rule.*

Rule 47 is based upon the same idea which is found in part of Rule 13. Its source in Roman Law can be found in the citations considered earlier. There are, however, two other texts in Roman Law which can be adduced and shown to be the basis for Rule 47. One of these texts is a Rule of Law of the jurist Gaius.[48] This Rule of Gaius is about the same textually as Rule 14 [49] of the Rules of Law of Pope Boniface VIII, which is not cited in the footnotes to the canons of the first book of the Code of Canon Law. The Rule of Gaius is primarily concerned with inheritance, but the concept of the Rule is aptly applied to any successor in office who is not legitimately aware of the acts of his predecessor.

The other text in Roman Law to be seen is a citation from the jurist Neratius. The text of Neratius is not found among

[45] *Ignorantia . . . generatim non praesumitur.*

[46] Cf. c. 2218.

[47] While not strictly applicable, the following Rules of Law can be profitably studied with Rule 13: Rules 11; 23; 25; 35; 42; 57.

[48] D. 50, 17, 42: *Qui in alterius locum succedunt iustam habent causam ignorantiae.*

[49] R. J. 14 in VI°: *Cum quis in ius alterius succedit iustam ignorantiae causam habere censetur.*

the Rules of Roman Law but is discovered in the citations under the title *de iuris et facti ignorantia.*[50] Neratius compares the juridical worth of ignorance of law and ignorance of fact. The conclusion, in effect, is that ignorance of law is inadmissible, while ignorance of fact can be admitted.[51]

In Canon Law, Rule 47 refers only to another's private acts. From its actual text, Rule 47 would seem to include every kind of ignorance. However, ignorance of law is immediately excluded from the scope of this Rule by the more detailed Rule 13. In the same way, once a comparison is made in the matter of ignorance of one's own actions and another's actions, it is immediately seen that the former ignorance is normally not admitted. This argument was given in detail in the discussion of Rule 13. The ignorance which remains is the ignorance in regard to another's acts. But here, too, a distinction must be made, and the force of Rule 47 is even further restricted. Another's public acts are presumed to be known, as the jurist Paul said in Roman Law,[52] and as it is definitely established in Canon Law in canon 16, § 2.[53] There remains only ignorance in regard to another's private acts. To these acts application of Rule 47 is made.[54]

The meaning, then, of Rule 47 is that in matters of doubt ignorance in regard to another's private acts (*facta*) is presumed.

Rule 47 does not support ignorance of another's private acts as desirable. It does, however, support this ignorance as an excuse.

[50] D. 22, 6, 2.

[51] *In omni parte error in iure non eodem loco quo facti ignorantia haberi debebit, cum ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat.*

[52] D. 22, 6, 9: . . . *Quid enim si omnes in civitate sciant, quod ille solus ignorat?*

[53] *Ignorantia vel error circa . . . factum alienum notorium generatim non praesumitur.*

[54] Reiffenstuel. *op. cit.,* Vol. VII, R. XLVII, no. 2–3.

As long, then, as ignorance of another's private acts is had, it does not matter how this ignorance arises provided one is not under obligation to know these private acts. Rule 47 fails of application where such knowledge is expected.

Rule 47 does no more than establish a presumption. This presumption can be overthrown by proof of knowledge. If this knowledge is demonstrated, Rule 47 will not support any act which might have been performed with the plea of ignorance of another's private acts. Hence, if one has knowledge of these private acts, he cannot himself act as if he did not know them thereby calling upon Rule 47 to support him.

Rule 47 is based on the moral impossibility of knowing all of another's private acts. Again, where knowledge does in fact exist, Rule 47 does not apply.

Ignorance in the sense of Rule 47 can be legitimately offered as an excuse. This is a legitimate excuse, and it must be sustained until knowledge is demonstrated.

The presumption found in Rule 47 is applied also to the knowledge of the Roman Pontiff. This is mostly in regard to local statutes. While a local statute is not a private act, the presumption in Rule 47 is equally applicable here because of the large number of such statutes and the moral impossibility of knowing all these statutes. The same presumption is applicable to the large number of customs.

Pope Boniface VIII is the authority for the probable ignorance of local statutes and customs, so that unless mention is made of these items, they are unaffected by general law.[55] As far as a study of the decretal of Pope Boniface VIII is concerned, it is sufficient to mention that the Pontiff compares universal law with particular statutes. The former is affected by a subsequent general law, the latter is not affected.[56]

[55] C. 1, *de constitutionibus*, I, 2 in VI°.

[56] *Licet Romanus Pontifex qui iura omnia in scrinio pectoris sui censetur habere, . . . quia tamen locorum specialium et personarum singularium consuetudines et statuta . . . potest probabiliter ignorare: ipsis . . . non intelligitur in aliquo derogare.*

Ignorance which Rule 47 will support as an excuse can arise from the deliberate act of another to conceal his act, his status or his condition. Thus one is not subject to the penalties attaching to the assult of a cleric if this cleric conceals the fact of his privileged status. This was already clear in a decretal of Pope Alexander III.[57] Caution, however, must be used in citing this decretal, for the Pontiff demanded an oath to support the excuse of ignorance. If this oath were refused, the usual penalty for assault on a cleric would be imposed. While of some use in the explanation of Rule 47, this decretal is suspicious of the actual ignorance alleged as an excuse.

Bartoccetti warns that Rule 47 may be used capriciously.[58] This warning is important and should always be kept in mind. People are prone to allege ignorance as an excuse for almost everything. It should be remembered that Rule 47 has a very restricted application.

If Rule 47 be understood properly and applied only in its restricted sense, the application of this Rule is valid. There is, however, danger of confusing this Rule so that it is applied to ignorance of one's own duties and offered as an excuse to avoid responsibility for this ignorance. In this instance, Rule 47 has no application at all. In fact, ignorance of one's duties is not primarily a legal item to be judged but a moral fault to be corrected. Ignorance, therefore, which is detected in incumbents in office is not within the presumption established in Rule 47. Such ignorance must be condemned as it actually is severely in one of the decretals.[59] There a prelate is held responsible for the deficiencies of his subjects.[60]

[57] C. 4, X, *de sententia excommunicationis,* V, 39.

[58] *Le Regole Canoniche di Diritto,* (Roma, 1939), p. 138.

[59] C. 10, X, *de regulis iuris,* V, 41.

[60] *Non enim potest esse pastoris excusatio, si lupus oves comedit, et pastor nescit.*

B. *The Pertinent Canon.*

Can. 16, § 2. *Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum alienum notorium generatim non praesumitur; circa factum alienum non notorium praesumitur, donec contrarium probetur.*

Canon 16, § 2 is divided into two parts. The first part is not pertinent here and was discussed in connection with Rule 13. The second part, however, is pertinent here.

Canon 16, § 2 establishes a presumption of ignorance of another's private acts. This presumption will stand as long as knowledge is not demonstrated. It can, therefore, in the sense of this part of canon 16, § 2 always be alleged as an excuse.

Canon 16, § 2 is of great importance in the estimation of actions performed by one's predecessor. As long as these actions are not public acts, ignorance must be presumed. Consequently, no legal or moral responsibility is shouldered by successors in office in regard to the private acts of their predecessors.

The presumption established in canon 16, § 2 must always be followed where a doubt of responsibility exists. If there was no obligation in law or morals to learn of the private actions of another, ignorance of these actions must be admitted as an excuse. It should be pointed out, however, that knowledge of another's private actions is, at times, demanded by law. The law of episcopal visitation, for instance, is such a law.[61] Ignorance cannot be alleged by a prelate even in regard to private breaches of discipline. It is the duty of Superiors to inform themselves, at least during the time of official visitation, how the disciplinary laws are obeyed by the clergy and people alike. The moral responsibility here is too obvious to be stressed. It follows, then, that the neglect of duty with the resulting ignorance is imputable and subject to possible penalty.

[61] Cf. c. 343, § 1.

Canon 16, § 2 says that this presumption of ignorance continues until the contrary is proved. Any method of proof will suffice. Testimony or documents are alike admissible. However, in the admission of these proofs, care must be exercised not to give more force than the law establishes. Hence, knowledge of canons 1754–1766 and 1812–1824 is necessary.

C. *The Application of Rule 47 to the Pertinent Canon.*

Once Rule 47 and canon 16, § 2 are properly understood, no difficulty appears in the application of the Rule to the canon.

Since Rule 47 is so restricted, application of this Rule is easily made. Rule 47 has reference only to the second part of canon 16, § 2. It has no reference whatever to the first part of this paragraph. As it was also discussed under Rule 13, there is no direct application of Rule 47 to the first paragraph of canon 16.

There is no need of further comment.[62]

D. *The Application of Rule 47 to Other Canons.*

An application of Rule 47 is found in canons 22 and 23. A derived application is made of this Rule in canon 22 and a further derivation is found in the interpretation of canon 23.

Canon 22 says that a universal law will not destroy local statutes and personal statutes which already exist unless a derogatory clause is found in the new law.[63] This is a restatement of the law of Pope Boniface VIII.[64]. Canon 22 obviously has no reference to such statutes as existed at the time of the promulgation of the Code of Canon Law. These statutes are controlled by canon 6, 1°. There opposition to the Code results in the cessation of particular law unless it is retained by

[62] In connection with canon 16, § 2, there is some usefulness in studying Rules 6; 9; 11; 14; 23; 41; 49 and 85. None of these Rules, however, are cited in the footnote to canon 16.

[63] . . . *lex generalis nullatenus derogat locorum specialium et personarum singularium statutis, nisi aliud in ipsa expresse caveatur.*

[64] C. 1, *de constitutionibus*, I, 2 in VI°. Cf., *supra* at note 56.

a special sustaining clause.[65] Canon 22 refers to new laws universal in character which might be different from local and personal statutes.

There is no direct application of Rule 47 to canon 22. But there is an application of this Rule in a derived sense, since the Roman Pontiff is not expected to know all the local statutes. Hence, according to the law of Pope Boniface VIII, he is not understood to wish these statutes abolished unless he gives clear evidence of his intention.

Canon 23 is joined to canon 22 in a way that a new law is not presumed to be different from the old law. An application of Rule 47 can also be made here, but only in the sense that the legislator is not expected to know all the local statutes. These statutes, therefore, remain even in the fusion of the old and the new law, unless a contrary clause be evident. This clause may be evident even though there be some doubt whether the new law revokes the old. In any case, the existence of this clause is not presumed.

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[65] E.g., c. 1236, § 1.

THE CONSTITUTIONS OF RELIGIOUS INSTITUTES AND MODERN TRENDS *

THE term "modern" indicates a characteristic of time, of present or recent time. A study, therefore, of constitutions and modern times implies some serious consideration of the element of time. Some might suppose that constitutions are subject to the vicissitudes of time, that they, like historical facts, must respond to the present historical needs. Others might prefer to think of constitutions as the rock foundation of religious life in the particular institute, assuming that constitutions are unchangeable even in the face of social transformation, unchangeable, like the rock by the seashore buffeted by the waves in perpetual motion.

Evidently there are two things regarding constitutions that can be discussed. One can ask first about the character of constitutions regarding their stability. Are the norms contained in constitutions a permanent and unchangeable body of law, or can they be changed? And, if a change is ever in order, how can the change be introduced? Once the nature of constitutions regarding stability has been established, one may further inquire as to the impact caused by trends on the constitutions.

In a study of timeliness one cannot ignore the possibility, and perhaps the tendency, to overextend the idea. Timeliness refers only to things which change with the times by keeping up with their requirements, or which lag behind by not adapting themselves fast enough. Timeliness, therefore, presupposes a change; not only a possible change, but a necessary one. Now, time is an accident to things; timeliness cannot touch what is essential, because the essential is not changeable; it stays or it disappears, but it does not change. This

* This study was prepared for the Reverend Mothers General meeting at the Dominican College in San Rafael, California, January 10, 1958, as an outline and guide for a series of conferences on the constitutions of religious institutes.

might be a reason why canonists as well as religious generally think of constitutions as something permanent.

Part I **—The Constitutions

Constitutions are generally so rich in content that they can be considered by religious as a kind of Bible, a Code of Law and an Ascetical Theology, all in one book. Constitutions speak about the evangelical counsels and a life molded according to the life of Christ as described in the Gospels; they outline the juridical life of the Church as lived by religious, and furthermore they point out the path, means, and advantages of a healthy and perfect spiritual life.

Constitutions, if they must be classified within the whole system of the Church, must be said to belong in its juridical level. Yet, if this is basically true, notice should be taken of the fact that constitutions extend also beyond the limits of the juridical and share very abundantly in the moral and spiritual elements of the Mystical Body. This will be clearly shown through this study.

If there be anything variable in the Church, it is in the juridical order that one finds it. The external manifestations of a life patterned, even though remotely, on the unchangeable life of God, are the least fixed elements. Dogma is substantially fixed; morals, if facing dogmas, are also fixed, but if facing the juridical life, they may be changed.

A look at the constitutions could easily discover a vision of beauty: the constitutions placed in the very center of the Glory of Bernini in the Vatican Basilica. That has happened symbolically many times. Such is the case every time a religious man or woman has been canonized. For a canonized religious is a saint sustained, enthroned, and eternally grafted on the living truth of God while here on earth. The state of perfection, within which they achieved the genuine success of holiness, is built in practice on the book of the constitutions

** Part II and Part III will appear in the succeeding quarterlies of the current year.

which the new saint observed daily and faithfully.[1] It is a daily experience that constitutions, as a juridical instrument with theological overtones, mold the life of many consecrated men and women as the most beautiful expression of the holiness of the Church. A religious is not cut off from the Church in order to form something different and apart from it; he is placed by profession very close to the Heart of Christ, the fountain of all holiness.

JURIDICAL NATURE OF THE CHURCH

Since constitutions belong in the juridical system of the Church, it will be necessary to have a clear understanding of the basic elements of this life, if one is to know the nature of constitutions. What makes the Church fundamentally different in its juridical aspect from every other juridical entity, and therefore from the state which is another supreme unit in the juridical order, is the end for which the Church has been established, to which it is indissolubly linked, by which it is necessarily informed, and to which it is immutably directed. The final end of the Church's organization and activity is, juridically speaking, an end of a nature entirely spiritual and beyond this world, while the end of every purely natural juridical state is of a kind typically material and earthly.[2]

From this fundamental and unique characteristic of the juridical nature of the Church follow four individual notes as unique as its end. These are the notes: a) universality, for the Church is a juridical structure intended to embrace the entire human race, even when its functions in a particular juridical unit are circumscribed to a specific social organization or to a certain territory; b) unchangeableness of its basic norms, for its constitutional law is made up of theologico-dogmatic principles, of divine, natural, and positive law which of their own nature are immutable and unchangeable; c) elasticity in

[1] Cf. *Normas Actuales de Santidad* in *Pecado, Confesion, Psicoanalisis* (Desclee, 1956) pp. 27–44.

[2] D'Avack, *Corso di Diritto Canonico* (Milan, 1956) I, 165.

the application of the norms; that is, abstract or general norms are applied with utmost consideration to each concrete social and individual situation, and therefore with a maximum elasticity and suppleness. This elasticity is always far removed from juridical positivism and the so-called " certainty of the law; " d) a two-fold hierarchical arrangement (of orders and of jurisdiction) and a different juridical capacity of the subjects, the laity having no juridical capacity to be vested with authority in matters pertaining to public law.[3]

The end—the salvation of souls and its consequent opposition to anything that promotes sin—enters into the juridical order of the Church as supreme directive criterion and as a restrictive clause of legislation.[4] That in the language of civilists would be called the fundamental limitation of the public order in the Church. In the civil state this order is essentially political, human, and contingent, and therefore variable in one and the same state at different times; it is also subject in its very being to evolution and changes according to the supreme will of the state. For the Church, however, it is a concept entirely dogmatic, religious, supernatural, and immutable, incapable of undergoing variations or changes in different moments of history; besides, it transcends and binds by its very nature the will of the Church which is obliged to respect it and to conform to it in its existence and activity. From this follows that the supra-juridical factor in the Church is much more important and emphasized in the juridical order of the Church than in the civil state.

The Church can be considered as a body governed by Christ and His ministers, or as a body vivified by grace.[5] It would be an error to think of these two aspects as independent and unrelated. For grace and virtue do not ignore the external elements which constitute the government in the Church, nor

[3] D'Avack, *op. cit.*, p. 165.

[4] D'Avack, *op. cit.*, p. 171.

[5] Tromp, *Corpus Christi quod est Ecclesia,* (Rome, 1946) p. 5.

does government proceed without a primary concern for grace. Christ, Head of the Mystical Body, uses the *magisterium,* the sacramental ministrations, and the juridical powers in the Church in order to give men the supernatural element that sanctifies them. On the other hand, the Church's jurisdiction, *magisterium,* and ministerial functions have no other ultimate end than the sanctification of those subject to such powers. It would be absolutely abnormal to use any of those powers without reference to the sanctification of those who make use of them or are their subjects.[6]

The distinction between the Church of charity and the Church of law (*Ecclesia caritatis et Ecclesia iuris*) cannot be admitted.[7] It is a Lutheran error to teach that the Church is the Mystical Body of Christ but understood as excluding everything visible, human, and juridical, and retaining only what is invisible, charismatic, and divine.[8] The Lutheran Sohm has been the strongest exponent in our days of this strictly charismatic idea of the Church. But as the English writer Bevenot says, " Its success was due to its fitting so well with the liberal desire to put an end to all juridical authority in the government of Christianity." [9]

It is evident that the juridical order of the Church has its deepest roots and finds its vitality in the mystery of the Church.[10] The God-man is the perfect exemplar for all the expressions of life in the Church. By the hypostatic union of His two natures and by His capital efficiency, Christ shows that His is the way the Church must follow. Therefore, Church law as such, as a juridical factor must be an apt, docile and loyal instrument entirely at the service of the divine.

[6] Sauras, *El Cuerpo Mistico de Cristo* (Madrid, 1952) p. 16.

[7] Cf. Pius XII, *Mystici Corporis, AAS.* XXXV (1943) 224.

[8] Salaverri, *El Derecho en el Misterio de la Iglesia* in *Investigacion y Elaboracion del Derecho Canonico* (Barcelona, 1956) p. 9.

[9] *Christianity in Apostolic Times: A Catholic Commentary on Holy Scripture* (1953) p. 639.

[10] Salaverri, *op. cit.,* p. 35. Cf. N. Moersdorf, *Fundamentos del Derecho de la Iglesia* in *Revista de Teologia,* III (1953), 18–28.

Church law can find the pattern of its genuine connection with the mystery of the Church in the exemplary union and capital character of the God-man.[11]

The phrase that best designates all the aspects of the mystery of the Church should contain the most direct explanation of the juridical elements in the Church. If one is to choose a phrase that accurately sums up the mystery of the Church, one should leave aside the name *Church of God,* as well as the one used by Journet as title of his monumental work *The Church of the Word Incarnate.*[12] The choice should fall upon the title preferred by the Vatican Council: *The Church of Christ.*[13] This name presents the Church in the integral form given her by Christ Himself, a Church built on the three powers of the *Magisterium,* Priesthood, and Government. In this Christ, the Messias, the divine Ambassador, reveals the profound realities that bind Him to the Father and to His own Being as the Word of God. In that, there is a synthesis including all that in the concrete is expressed and implied in the titles *Church of God* and *Church of the Word Incarnate.* Everything is found in the name *Church of Christ.*[14]

The state, which is a natural society, is sufficiently equipped by having only juridical powers with their three-fold function —legislative, judiciary, and executive or coercive. This is possible because the state finds its subjects already prepared by the family, the first unit of the state. Furthermore, each individual is endowed by nature with an innate aspiration to achieve a higher social good than he could achieve all alone.

The Church, however, before beginning to exercise its juridical powers over people, must give them a new life which they do not have. They must be regenerated through baptism. Mother Church lives essentially by the revealed truth of God; that same truth is the basis of the new life communicated to

[11] Salaverri *op. cit.,* p. 41.

[12] Sheed and Ward, 1955.

[13] *Constitutio Dogmatica* I *de Ecclesia Christi,* Denziger, n. 1821.

[14] Cf. Pius XII, *Mystici Corporis, AAS.,* XXXV (1943), 200 and following.

men. Therefore, the juridical powers of the Church, by their very nature require for their exercise the use of the other two powers, the *Magisterium* and the Priesthood.

It would be difficult not to notice here the obvious basic similarity found between the Church and the religious life. The juridical or external functions of the religious life cannot be exercised until the subjects have been prepared by raising them to a higher spiritual manner of life where the counsels become an obligation, where the new life is necessarily bound to the practice of the evangelical counsels.

In this study there is great significance in the difference that exists between the manner in which one vested with the powers of orders and one vested with the powers of jurisdiction or government is related to Christ as His vicar. The power of the priesthood in its sacramental and sacrificial function is vicarious in relation to Christ in a degree not reached by the powers of jurisdiction.[15] The priest acts with such dependence on Christ that his actions are truly *instrumental,* in complete subordination to the influence of the *principal* cause which is Christ.[16] In the powers of orders one finds the greatest guarantee of unfailing efficacy.

LAW AS AN INSTRUMENT

The powers of jurisdiction, although placed also under the influence and assistance of Christ and the Holy Spirit, are not so strictly instrumental. One vested with the powers of jurisdiction exercises, in the name of God, a power received from Him; but in its exercise the superior uses it as his own power. A superior, therefore, can make use of the power of jurisdiction, within certain limits, as a master and is guided by his own freedom and responsibility. The limits are set by the common end of the three Messianic powers—teaching, government, and priesthood—namely, the salvation of souls. Within

[15] Salaverri, *op. cit.,* p. 52.

[16] Cf. Congar, *Ordre et Jurisdiction dans l'Eglise* in *Irenikon,* VI (1933), 22 and following.

these boundaries, the proper and formal juridical end of the law of the Church is to order and direct the various visible functions of its members and to establish that external disposition of visible means which is most apt to help its members obtain more efficiently their full and personal incorporation with Christ.[17]

Evidently here there is greater leeway for human initiative which, aside from the case of the Pope's infallibility, implies a lesser guarantee of efficacy: the human cause might fail to be in perfect harmony with the divine cause, fountain of the power of jurisdiction. Hence, the responsibility and great obligation which the superiors have to maintain a living contact with the fountain of truth and life in the Church.

The function of the law, however, is an instrumental function, namely that of serving.[18] From this principle it follows that the relationship that exists between the end of society and the end of its law must be of the same type as the relationship that exists between the end of an instrument and the end of that for which it serves. The instrument takes its specification from its own immediate end which makes the instrument different from all other instruments. It is therefore proper of an instrument to be able to serve the ultimate end only and insofar as it serves well its immediate end.

Church law, both as a juridical and moral instrument, has the same remote end, which is the good of souls. This end, anchored in the divine eternal plan of God, gives stability to the law. Its stability is not always the same, for the law as a juridical instrument has a specific immediate end different from the specific immediate end of law as a moral instrument.[19] The juridical is often intimately connected with the moral in Church law. Yet each has its own character and purpose.

[17] Cf. Wilches, *De Fine Iuris* in *Antonianum,* XIX (1944), 270–278.

[18] Cf. Radio address of Pius XII, *AAS.,* XXXV (1943), 13.

[19] Cf. Salazar, *Lo Juridico y lo Moral en la Tecnica Legislativa* in *Investigacion y Elaboracion del Derecho Canonico,* (Barcelona, 1956), p. 105.

The immediate end of the juridical order in the Church is to guarantee each member of the Church what is his due in regard to the good of souls. Therefore the Code of Canon Law, as a juridical instrument, does not seek *directly* the good of souls, but only *indirectly*. A canonical norm directly intended for the good of souls would not be juridical, at least under the aspect of its seeking the good of souls; rather it would be a moral norm.[20] Consequently, from the point of view of a jurist, the immediate and proper end of Canon Law is a just social order in the Church, for the final end of the good of souls.

For the better understanding of the relative values of the means used in the Church, and specifically in the religious life for the realization of one's vocation, a practical conclusion should be drawn now. Being a juridically good religious does not make one a morally good religious. But since the juridical norms are a means to the moral end with which they are therefore connected and intimately related, one is not free to ignore the juridical norms. The juridical law is not intended directly to lead the subjects to moral perfection; yet it helps to attain it in various ways: by preventing everyone else from interfering with one's progress toward moral perfection and by preparing the proper climate so that one may reach his moral end which is perfection.[21]

Canon Law, as well as all its derivatives and determinations, like the constitutions of religious institutes, has characteristics and exigencies which are entirely singular and easily detected. They follow from the very nature of the Church. This is a society whose structure and authority, and even the very reason for its existence and survival, comes directly from God.[22] The Church is a society whose law as a norm and as a science is subservient to dogma and theology.[23] Canon Law is not

[20] Salazar, *op. cit.*, p. 106.

[21] Salazar, *op. cit.*, p. 135.

[22] D'Avack, *op. cit.*, I, 15.

[23] Renard, *La Posizione del Diritto Canonico* in *Revista Internazionale di Filosofia e Diritto*, (1936), 488.

closed in itself; it is open towards heaven; it is projected towards the infinite and the eternal.[24]

It should be noted again that juridical norms of themselves are never moral norms, although there exists between them an intimate connection precisely because there is an intimate connection between the religious substance and the juridical form of the Church. Since dogmatic tenets are at one and the same time theological principles and juridical commands, it follows that dogmas are the fundamental constitutional norms of the ordination of the Church in the juridical field.[25]

CHARACTER OF CHURCH LAW

Although the dogmatic fundamental principles of the Church are immutable, there is no other system of law which shows more flexibility and adaptability in its applications, and which knows best how to accommodate itself with the greatest understanding to the circumstances and needs not only of the times, places and peoples in general, but of every individual person as well.[26] The flexibility of Canon Law eliminates completely even the possibility of the Church accepting the so-called juridical positivism. Church law by reason of its intimate nature and intrinsic substantial characteristics is immune from the danger of becoming a rigid, absolute, and abstract law.

It is of particular interest to notice in reference to religious life, which is total in its dedication, one of the notes of the juridical order of the Chuch. Her competency is fixed. The civil state is by its own nature political; that is, its end (the temporal welfare) is intrinsically variable and changeable, subject to historical, social, economic and ethical contingencies of the civil community. The Church, however, is apolitical; that is, its end (the supreme good of souls) has an eternal character and is absolutely removed from the evolution and

[24] Giacchi, *Sostanza e Forma nel Diritto della Chiesa* in *Jus,* (1940), p. 17.

[25] D'Avack, *op. cit.,* p. 125.

[26] D'Avack, *op. cit.,* p. 201.

transformations of all demands of any kind whatsoever of society.[27]

From this note it follows that the state can, in reference to its changeable end, include in the sphere of disciplinary competency any matter and all kinds of external actions capable of juridical evaluation. The Church, however, in relation to its immutable end, finds the matter and the kinds of external actions capable of juridical evaluation which constitute the object of its juridical norms immutably determined and fixed. Hence the state rightly assumes a competency essentially variable, attributing to itself within the proper territorial and personal sphere a full and absolute capacity to regulate in the juridical order all things and all external actions capable of juridical evaluation. The Church, however, claims only the capacity to submit to juridical norms only those matters and those external actions capable of juridical evaluation which have direct or indirect connection or interest regarding its preestablished supernatural end. The Church acknowledges the existence of a large area of a juridical character exclusively left to the disciplinary juridical norms of the state.

The predetermined competence of the Church suggests a juridical unity which is not often found in the civil states. Democratic states especially boast of their system of checks and balances, a system which splits the powers proper to a perfect society. The legislative, judiciary, and executive powers are vested in three different physical or moral persons. A careful consideration will show that the division of powers is a political creation. History has evidenced that the division of powers assumes a great importance in a civil state. Originally this division was devised as a defense of personal rights; it was introduced against the absolute state in order to protect the liberty of its citizens against the arbitrary will of the public authority.[28]

[27] D'Avack, *op. cit.*, p. 178.

[28] Fuentes, *Commentarium pro Religiosis,* XXXII (1953), 198.

A division of powers becomes necessary in society when the state is secularized. When the balance is lost because God is not recognized as the final norm of the justice of every law; when the check of natural law is discarded; when the source and measure of justice is placed in the will of the state, as expressed in the law, whether this be an expression of an individual will as it happens in an absolute monarchy and in a dictatorship, or whether it be the expression of a collective will as in a democracy, society has to provide some restraint and some kind of guarantee that the basic human rights will not be ignored. Without such restraint and guarantee suicide for society would result.

These political reasons do not exist in the Church. Christ's institutions are of a total character; the life of the Church and the life of souls have a unity of a transcendent nature. It is the unity of the Mystical Body. Hence, superiors in the Church may have a total power—legislative, executive, and judiciary all vested simultaneously in an individual person, like the Pope for the universal Church and the Bishops for their own particular territory.[29]

THE RELIGIOUS STATE

The juridical aspect of the Church is communicated to the states of life in the Church. Therefore, the states of life carry along an external obligation; they are a " thing of the Church " with a structure eminently social, sharing the visibility of the Church. Whoever embraces a state of life becomes thereby involved in an order that surpasses the individual; an obligation is contracted which binds before others, in regard to them, and one cannot withdraw at will.[30]

Consequent to the nature of the juridical aspect of the religious life, the Church, taking into consideration the variable conditions in which Christian society moves, very carefully determines the practical requirements of the religious vows.

[29] Cf. canons 218 and 335.

[30] Lemoine, *Le Droit des Religieux* (Desclee, 1956) p. 17.

The vows define religion, and religion supports the vows. Furthermore, religion introduces rules which fix, limit, and specify the manner in which the vows must be observed. There is in religion a social, public, and exterior character which imitates the juridical character of the Church.[31]

The religious state, like the Church, has a synthesis of theological and juridical elements intimately interwoven in a unity which is analogous to the divine unity of the hypostatic union of the God-man: the divine and the human are meant to harmonize. Since the religious state is a state of perfection, perfect charity must be its goal.[32] Nothing in the religious life can be properly understood aside from this concept of the juridical state of perfection. Its theological and juridical elements must be fully grasped before it can produce the fruits of perfect religious life. The constitutions outside this sphere are emasculated; then the theological is not sustained by the juridical, nor is the juridical vitalized by the theological. The synthesis of the two elements is the only context where the letter and the spirit of constitutions will obtain full meaning.

Garrigou-Lagrange sums up the theological substance of the religious life in three principles taken from St. Thomas.[33]

First principle: Christian perfection consists in charity whereby we are united to God, our last end.[34]

Second principle: The counsels are the instruments of perfection.[35]

Third principle: The religious life is a state of perfection in which one consecrates himself to God entirely.[36]

[31] Cf. Lemoine, *op. cit.*, p. 17.

[32] St. Thomas, *Summa Theologica*, 2, 2, q. 184, a. 1.

[33] Cf. *Timely Renovation of the Theological Elements of the States of Perfection* in *Acta et Documenta Congressus Generalis de Statibus Perfectionis* (Editiones Paulinae, 1950) I, 155–156.

[34] Cf. St. Thomas, *Summa Theologica*, 2, 2, q. 184, a. 1.

[35] Cf. 2, 2, q. 184, a. 3.

[36] Cf. 2, 2, q. 186, a. 1.

These principles are immutable,[37] and constitute the solid basis of the only sound and healthy stability of any religious in the pursuit of his divine vocation. The counsels which are the instruments of perfection are the general evangelical counsels, that is, the counsels of obedience, chastity, and poverty. The reason for that is the following. The general counsels are given not only because of their goodness and honesty, but also for their usefulness as means to acquire other virtues, especially charity. The particular counsels are given for the goodness in them.[38] Total consecration to God implies the exercise of the three general evangelical counsels, and that is enough for Christian perfection, if rightly understood.[39] The three general evangelical counsels remove the general obstacles to perfect charity and supply the general instruments of all virtues.

As a state, the religious life requires stability and a bond of union or incorporation. From the human point of view, the nature of this bond is of primary significance. Here lies the bridge that unites the candidate to the religious life, to a way of life which Jesus Christ proposes subject to the free choice of man, and which originally is only a matter of counsel. The bond which binds a religious must be a moral bond. This is required by the nature of man, by the end to be pursued in the religious life, which is charity, and by the means a religious must use, which are the general counsels. The moral bond contemplated here is an obligation towards God freely accepted to strive permanently in a special way to obtain the perfection of charity.[40] This type of obligation is the only possible way whereby a *human state* can obtain *moral stability or immutability.* St. Thomas gives this explanation: ". . . in human acts, a matter is said to have stability in reference to its

[37] Cf. Garrigou-Lagrange, *op. cit.*, p. 155.

[38] Suarez, *De Religione,* tract. VII, lib. L, cap. VIII, n. 20.

[39] Gutierrez, *Doctrina Generalis de Statu Perfectionis* in *De Institutis Saecularibus* (Rome, 1951) p. 255.

[40] Cf. Gutierrez, *op. cit.*, p. 259.

own disposition in the point of a certain immobility or restfulness . . . That alone seemingly pertains to a man's state, which regards an obligation binding his person, in so far as a man is his own master or subject to another, not indeed from any slight or unstable cause, but from one that is firmly established." [41] The obvious sequel of this principle is that "the state of perfection requires an obligation to whatever belongs to perfection." [42]

The religious state is in the land of the free; only the free can enter; only the free qualify to make this choice. For the obligation which is part of the theological nature of the states of perfection cannot arise independently of the consent of the one embracing the religious life. This life and its obligations are a matter of counsel, and not of precept. And it is evident that no one can be bound to things of counsel by another's will beyond one's consent.[43] The positive law of the Church has taken this into consideration, and the Code of Canon Law demands perfect and absolute freedom in the choice of the life of the evangelical counsels.[44]

Every man is bound to seek the perfection of charity in a general way.[45] Hence one may assume that the second principle announced by Garrigou-Lagrange and taken from St. Thomas is the specific characteristic of the religious life. It is the counsels that make the difference. A religious is bound to strive after perfection in a special way, both by using special means added to the common precepts, and by being under special obligation to make use of the special means. According to St. Thomas, the religious state requires that one be bound to these three (poverty, continence and obedience) by vow.[46] Later on it will be

[41] 2, 2, q. 183, a. 1.

[42] St. Thomas, 2, 2, q. 186, a. 6.

[43] Suarez, *De Religione,* tract. VII, lib. I. cap. XII, n. 2.

[44] Cf. canon 572, § 1.

[45] Cf. A. Peinador, *De Perfectione Christiana* in *De Institutis Saecularibus,* (Rome, 1951) I, 235–251.

[46] 2, 2, q. 186, a. 6.

explained that an obligation not under vow can be sufficient to constitute a state of perfection. As a matter of positive law, the canonical public religious state actually requires the three vows of poverty, chastity, and obedience.[47]

The actual degree of perfection of a person does not pertain by itself to the religious state. It is not only saints that belong here. St. Thomas leaves no room for doubt that the state of perfection consists only in the obligation of striving after perfection. Actual perfection or even actual striving after perfection does not constitute the state of perfection.[48] Wherefore, the Saint adds, nothing hinders some from being perfect without being in the state of perfection; and some from being in the state of perfection without being perfect.

KINDS OF OBLIGATION

The obligation which constitutes the state of perfection must be an obligation *before God* or an obligation in conscience. Only then can an obligation be called *moral.*[49] An obligation before God can be contracted directly or indirectly. A vow or consecration will produce a direct obligation; a promise or a promissory oath made to a man, but intended to bind before God, will produce an indirect moral obligation. In the case of the religious state, the very nature of its end (the perfection of charity) and its object (the evangelical counsels) amply indicate that the vow is the better mode of establishing the obligation before God. Historically, however, it is clear that the vow is not required in the Church for the state of perfection.[50] Neither is a vow necessary for the theological stability required in the religious state, as Suarez has sufficiently proved.[51]

[47] Cf. canon 487.

[48] Cf. 2, 2, q. 184, a. 4.

[49] Gutierrez, *op. cit.*, p. 263.

[50] Cf. canon 673; Kurtscheid, *Historia Iuris Canonici,* (Rome, 1941) p. 77.

[51] *De Religione,* tract VII, lib I, cap XII, n. 6; cf. Tabera, *Derecho de los Religiosos* (Madrid, 1952) p. 592, 1 b.

Since a juridical state is born of the public powers of society, it follows that a juridical state requires the intervention of the public authority for its establishment. It is by such an act that a new juridical state obtains rights, privileges, powers, and obligations in the external forum.[52]

Besides the juridical differences there might exist between a public and a private juridical state, one can point out a relevant theological difference. This difference is based on the nature of the vows which can be public or private. Members of the states of perfection who take public vows are designated by the public authority of the Church as sacred persons destined to offer God a public worship; their service of God is more than a private devotion, as it happens in the case of members of the states of perfection who take private vows.[53]

In the preceding pages the terms juridical or canonical, theological, and moral have been used repeatedly. These terms have a definite relation to the various kinds of obligation that bind a religious. As A. Peinador very pointedly says, an integral orientation or instruction regarding the duties of the religious life must include not only the motives or reasons for the practice of perfection, but also a clear and definite explanation of everything that has the aspect of sin or no sin in reference to perfection; and furthermore, also a precise explanation of what the Church prescribes either as necessary or merely convenient for the better attainment of the end proper to the religious life.[54]

The nature of the specific kind of one's obligation is not always clearly stated by canonists or moral theologians, and still less by spiritual writers, except in classic works. One may distinguish three kinds of obligations: moral, ascetical, and ju-

[52] Cf. canon 100 § 1; Michiels, *Principia Generalia de Personis in Ecclesia* (Desclee, 1955) p. 394.

[53] Cf. Wernz-Vidal, *De Religiosis* (Rome, 1933) p. 13.

[54] *Deber Canonico, Obligacion Moral, Perfeccion Religiosa* in *Vida Religiosa*, V (1948), 22.

ridical.[55] It is characteristic of a moral obligation to control human freedom both externally and interiorly, by the force (not physical but moral) of the necessary responsibility before God, Who is the first law and the last end of all the actions of every creature. This obligation is generally called an obligation in conscience or before God.[56] Therefore, moral obligation is precisely the need to act in conformity with the law under pain of venial or mortal sin. The transgression of a moral obligation causes a stain in the soul from which one can be freed only by a positive and active purification either here or hereafter. A moral obligation means that one must choose between fulfilling a clear and positive precept imposed as a necessary vital law of the spirit and its opposite; that is, to choose between good and evil.[57] A moral obligation starts with the fundamental dependence of man upon God, Who is the beginning and end of all things. Hence it can control not only external conduct and what pertains to society, but also the interior disposition and what is not related to others.

An ascetical obligation exists when the norm one could transgress is only the expression, certain at least in the subjective sense, of what in a given set of circumstances is better in the scale of spiritual values. To act against an ascetical obligation means that one will certainly be deprived of additional grace, and thereby his spiritual progress will be retarded. The breaking of this kind of obligation is not a sin in itself because it is not against a precept or a virtue. Here the choice is not between good and evil, but between what is good and what is better; between an imperfection if one performs an act less perfect and an act positively more virtuous; between growing and not growing spiritually.[58] Ascetical as well as religious obligations refer to perfection. Now the idea of perfection in-

[55] Ferrari, *Il Problema della Obbligatorietà* in *La Direzione Spirituale nei Seminari* (Vatican City, 1956) pp. 228–229.

[56] Peinador *Vida Relig.*, V, (1948) 18.

[57] Ferrari, *op. cit.*, p. 228.

[58] Ferrari, *op. cit.*, p. 229.

dicates something higher than canonical or merely moral obligation. It consists in the practice of Christian virtues by using all the proper means, especially the means of mere counsel, with preference for the evangelical counsels. Peinador accurately distinguishes between ascetical and religious perfection. The difference, he says, between ascetical and religious perfection consists in this: ascetical perfection is the private exercise of the Christian virtues, but not in a manner juridically or authoritatively organized by the Church. The means employed, although efficacious, do not have the power and efficiency which proceeds from the official and public approval given by the Church. Religious perfection, on the other hand, is the public exercise of the Christian virtues, officially authorized by the Church. The means used receive their special efficacy principally from the pontifical or ecclesiastical approbation.[59] Generally speaking, an ascetical obligation touches one's conscience rather powerfully, because it is presented to the soul as a better means and more secure method to grow in grace.[60]

Juridical, strictly or properly so-called canonical, obligation subjects one's *social activity* to certain ways of acting demanded by the identity of ends pursued by all and by the identity of means they must use. A canonical obligation regulates the exterior conduct of a Christian in what pertains to the Church as a society of the spiritual order. Juridical duties demand obedience to the exterior discipline in the exercise of one's activities, and establish one's responsibility before God or in conscience. A juridical obligation is, therefore, the moral need to conform one's conduct to the norms issued by the ecclesiastical superiors, which are generally contained in the laws or canons of the Church.[60a]

[59] *Vida Relig.*, V (1948), p. 19.

[60] Ferrari, *op. cit.*, p. 229.

[60a] Cf. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. I, Tom. II, *De Legibus Ecclesiasticis*, (Mechliniae-Romae, 1930), nn. 133; 136, p. 146; n. 152.

The following would be a practical application of the general idea of the juridical obligation a religious might have. The specific canonical or juridical obligation of every religious consists in his duty to submit to the exterior discipline ordered by the Church for the proper organization of the religious life, its development and expansion, the right government and the better application of the means proper to this type of life. For the superiors, the juridical duty consists in governing, not according to their own personal initiative, but according to the general and particular laws of the institute.[61]

What may be termed a *merely juridical* obligation arises from a norm issued by a superior who does not bind one's conscience; who intends *only* to provide external order and the proper functioning of a community. Since the superior does not intend directly to bind the conscience of his subjects with that norm, he is satisfied if they observe it externally. For this end, he often establishes some external sanction for the transgressors. As a consequence, a juridical obligation arises which binds the external actions of the subjects besides making them liable to the risk of a juridical sanction; but this kind of obligation does not imply, when not fulfilled, any spiritual loss either of a moral or ascetical nature.[62]

Thus it is seen that in practice an act can be obligatory both as a moral and a juridical duty.

The three aspects of obligation respond to three kinds of law which are interpreted by three kinds of experts: Canon Law interpreted by the canonist or jurist, moral law by the theologian, and ascetical or religious law by the spiritual director or superior. As stated above, all Church laws look ultimately to the good of souls. Saint Pius X in his *Norme per l'ordinamento scolastico, educativo e disciplinare dei Seminari d'Italia* (1908) wisely stated that the practical norms of discipline that rule the life of the seminarian, by promoting the external

[61] Peinador, *Vida Relig.*, V (1948), p. 17.

[62] Ferrari, *ibidem;* cf. Van Hove, *op. cit. loc. cit.*, esp. n. 152.

order, seek to produce an interior order of the will that trains it for duty and virtue.[63]

THE LAW OF UNITY

The complexity of elements which make up the Church and its vast organization finds a supreme synthesis in a most marvelous unity. The Church can fittingly be described as " many are one." This law of unity has a particular application to religious, precisely because they are dedicated to live a perfect life in the Church; their business and profession is to strive to be perfect. The religious state is a way of life that embraces the entire man, including all his activities, none of which can be considered outside or beyond its domain. By religious profession one gives all of himself, soul and body, to God and religion. This consecration permeates his entire being, dedicating it completely to the activities proper to the institute. A religious is subject to the dominative power which, being more penetrating than the power of jurisdiction, does not stop with the exterior, but enters into the interior, reaching the purely internal actions, in virtue of the license given by the voluntary surrender which is the foundation of the religious life. Such a way of life that affects man in all his depth and breadth must of necessity require a rather complicated and minute system of law for the ordering of the life of all the members of each institute.[64]

The canons of the Code of Canon Law dealing with religious outline the fundamentals of the religious state which are common to all institutes and define the basic characteristics proper to the main categories of religious. Great is the variety of religious institutes in the Church—a marvelous sign of its inexhaustible vitality under the guidance of the Holy Spirit. Each institute has its own end, organization, spirit and proper spiritual life. All this is regulated by the norms of particular law which must be sufficiently wide and varied to serve well

[63] Quoted in *La Direzione Spirituale nei Seminari,* p. 155.

[64] Escudero, *Normas del Derecho Religioso* in *Vida Religiosa,* VI (1949) 85.

their purpose. The particular law must embrace everything from the fundamental constitution of the institute to the smaller details of daily life as required by the common life which, by the will of the Church, is in fact an essential element of religious life.[65] Since community life is compulsory in the juridical and public state of perfection,[66] norms about daily life, which outside the religious life might pertain only to social graces, in religion may be juridical and obligatory.[67]

St. Francis of Assisi came to know for the first time in 1210 that from the Gospel, from the foolishness of the Cross of Christ, was born an observance guided by reason, an organization built on law and other norms.[68] This is another way of saying that in the Church the juridical flows from the theological. Besides, there is another profoundly psychological reason which demands a set of norms to direct and maintain the efforts towards perfection of dedicated men and women. A great number of people, including the mediocre and ordinary, only through the norms of a juridical order and sober and prudent government can be kept in the atmosphere of the ideal and can be led to live the seraphic life and to do the works of the apostolate in a way suitable to the variable conditions of time. However, not too much credit should be given to the law. For to lead to high things is not the role of the law; that pertains in the human level to individual spiritual direction.[69]

RULES AND CONSTITUTIONS

From the very beginning, practical reasons dictated that religious institutes should have their by-laws, which canon 489 calls Rules and Constitutions. These are the laws proper to each institute mentioned in canon 488. They first list the rights and duties assumed by the members as to the extent of

[65] Creusen, *Religious Men and Women in the Code* (Milwaukee, 1951) p. 9.

[66] Cf. canon 487; Jombart, *Common Life* in *Acta et Documenta* I, 226.

[67] Escudero, *ibidem*, p. 86.

[68] Wagner, *Historia Constitutionum Generalium O.F.M.* (Rome, 1954) p. 15.

[69] Cf. Wagner, *op. cit.*, p. 165.

the vows, the exercises of piety, and the ministries; and secondly, they order all that pertains to the government of the institute.[70]

At first the rules needed were very few. It was not that community life could be completely managed with those very few rules, but that most of the detailed and practical direction was left to the authority and prudence of those who presided over the monasteries and religious living therein.[71] This arrangement could not last very long, as times changed and superiors were not perhaps of the high caliber of founders or the early spiritual fathers. The small code of norms by which early religious life was regulated was called the Rule. According to Cappello, the Rule, in orders founded before the sixteenth century, was the fundamental law common to several bodies of religious.[72] Larraona describes a Rule as an ancient set of laws, mostly of an ascetical character, with hardly anything of a juridical nature, originated by one of the great founders and considered to be immutable.[73] Maroto, in an exhaustive study of Rules and Constitutions, (*Regulae et Particulares Constitutiones* (Rome, 1934) calls the Rule a set of norms that are fundamental, ascetical, and brief; a small and complete code, of ancient origin, whose author is an ancient monk or superior or Bishop. The Rule had papal approval, was perpetual, and was common to several societies of religious (pp. 11–30).

The four main Rules were those of Saints Basil, Augustine, Benedict and Francis.[74] Maroto speaks only of the three best known Rules: The Rule of Saints Basil, Augustine and Benedict.[75] To these later on were added others, which were also

[70] Larraona, *CpR,* II (1921), 207.

[71] Cf. Muzzarelli, *Timely Renovation of Constitutions* in *Acta et Documenta,* I, 531.

[72] *Summa Iuris Canonici* (Rome, 1945) II, 9.

[73] *Scuola Pratica di Diritto dei Religiosi* (1952–1953) Mimeographed notes, p. 142.

[74] Larraona, *op. cit.,* p. 142.

[75] *Op. cit.,* p. 25.

given papal approval by a special act of the Roman Pontiff; namely, the Rules of the orders of the Most Holy Trinity, of the Carmelites, of St. Francis of Assisi, and of St. Francis de Paula.[76] To each of these Rules special norms were added in order to make the Rule practical. With one exception, the Rule of St. Benedict, it was impossible to organize an institute with only a Rule.[77] The Rules of Saints Basil, Benedict, Francis of Assisi and of Blessed Albert Patriarch of Jerusalem were written for men, and can only with difficulty be used by modern congregations of women. That is not the case with the Rule of Saint Augustine, which up to the present time is followed by many institutes.[78]

The norms or laws added to the Rule were often called constitutions, or at times also statutes.[79] From the beginning constitutions were particular law, in the sense of canon 489.[80] St. Francis de Sales describes the respective function of the Rule and the constitutions as follows: The Rule tells what must be done; the constitutions, how it must be done.[81] The institute of the *"Certosini"* was the first religious institute to be organized with statutes only, without any Rule.[82] This marks the beginning of a new trend. From then on, founders, moved by humility, preferred to adopt one of the ancient Rules. This trend was favored by the Church for there was no desire for more religious institutes. The fourth Lateran Council made this practice a law, thus stopping new foundations that could be the result of vanity and a desire for novelty.[83] Then, as it

[76] Maroto, *op. cit.*, p. 28.

[77] Larraona, *op. cit.*, p. 143.

[78] Mothon, *Traité sur l'Etat Religieux,* (Paris, 1922), p. 66.

[79] Cf. Cappello, *op. cit.* p. 10.

[80] Maroto, *op. cit.*, p. 43.

[81] *Preface to the Constitutions for the Religious Sisters of the Vistation* in *Obras de S. Francisco de Sales* (B.A. C., Madrid, 1954) II, 537.

[82] Larraona, *op. cit.*, p. 143.

[83] Larraona, *op. cit.*, p. 143.

was to be expected, arose the need to find a way to characterize or diversify the new institutes. Constitutions were the answer to the problem.

Little by little constitutions came to supplant the Rule in the new communities, so much so that the case where the Rule was left out entirely became more and more frequent. This was possible because many exceptions were made to the law enacted by the fourth Lateran Council. As Larraona points out, it is not clear whether the Theatines (Order of Clerics Regular) ever accepted the Rule of St. Augustine. It is certain that none of the other orders of clerics regular (Jesuits, Camillians, Clerics of the Mother of God, Pious Schools, Barnabites and Somaschians) ever had a Rule; they were governed only by constitutions.[84] Thus constitutions became the fundamental particular law of religious institutes, and less changeable than before, when their role was to make the rules practical and workable. According to Maroto, from the sixteenth century on the practice was not to have a Rule, but only constitutions.[85]

As religious institutes became better organized, and constitutions, having supplanted the Rule, became more fundamental and stable, new norms were introduced as a practical application or extension of the constitutions. This explains the different meaning of the term " constitutions " in the history of the religious life. Larraona explains it clearly thus: " Constitutions has a two-fold meaning. In the earlier days one spoke of the Rule and Constitutions; later on a change was made to constitutions and rules (in the plural)." [86] This is the terminology used today. Constitutions are the fundamental laws approved by the Holy See; rules (in the plural)

[84] Larraona, *op. cit.*, p. 143.

[85] *Op. cit.*, p. 5; cf. Cappello, *op. cit.*, p. 10.

[86] *Op. cit.*, p. 142.

are the more detailed norms drawn up in keeping with the mind of the Constitutions.[87]

Not all the norms that regulate the life of a religious have the same value of binding force. A knowledge of their hierarchy of obligation will help to solve wisely the possible conflicts which may arise in practice. Norms higher in the hierarchy of obligation should be given priority. Furthermore, a clear understanding of the values of the various laws will supply the best orientation or criterion regarding the authority superiors have to dispense from the law.

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[87] Cappello, *op. cit.*, p. 10; cf. Schaefer, *De Religiosis*, (Rome, 1940, p. 104; Tabera, *op. cit.*, p. 27; Mothon, *op. cit.*, p. 66.

THE RIGHTS AND DUTIES OF TRUSTEES AND THEIR APPOINTMENT

AMONG the prerogatives of the Church as perfect society is her inherent right to administer property. Even from a very early period in her history the Church, in exercising this right, has often appointed deputies or administrators who assist her in this work and who are at the same time responsible to her for their management of the ecclesiastical property and funds which have been entrusted to their care. Such administrators, whether cleric or lay, are called technically the " fabric " of the Church.[1]

In the early days of the Church in the United States the employment of these administrators took practical form in the so-called trustee system—a system by which church congregations were incorporated under the laws of the respective States and by which the management of church property and funds was put into the hands of elected lay trustees.[2] (This system sometimes involved trustees who were clerics, as will be seen below,[3] but it is often referred only to lay persons.)

The rights, duties, and appointment of trustees, especially of lay trustees, constitutes the subject matter of this paper. In treating this matter, the writer will look both to the legislation of the provincial and plenary councils of Baltimore for pertinent provisions therein and to the pastoral letters issued after the various councils for further expressions of the mind and will of the American bishops concernings trustees. For the sake of completeness he will correlate any universal legislation that he finds in the Code of Canon Law with the partic-

[1] Manning, " Trustee System," *The Catholic Encyclopedia* (15 vols., index, and 2 supplements, New York, 1907, 1922), XV, 71.

[2] Roemer, *The Catholic Church in the United States* (St. Louis and London: B. Herder Book Co., 1950), p. 142.

[3] Cf. pp. 181; 183; 185; *infra.*

ular law that was issued in the councils of Baltimore and evaluate this conciliar law in the light of the legislation in the Code.

Before proceeding to a consideration of the conciliar law of Baltimore and the mind of the American bishops in reference to trustees, as expressed in their pastoral letters, the writer wishes to note briefly the historical factors which do much to explain the aforesaid law and episcopal pronouncements.

In the early days of the English colonies the holdings of the Church were kept in the name of individual priests. After the Revolution this property was secured for the Church by the Select Body of the Clergy through its incorporation under State laws. Within a short time, however, this property did not suffice to support the growing number of priests, particularly those who came from abroad. New means had to be sought for the sustenance of the clergy as well as for the building of churches, and these funds had to be secured before the law.[4] Indeed, the laws of the United States had much to do with the establishment of the trustee system, for according to those laws churches could not possess unless they were incorporated by the legislature of the State in which they were located. For valid incorporation the law demanded that there be administrators for the church property. These administrators were called trustees or vestrymen. By means of the act of incorporation all the material value of the church, of the rectory, of the cemetery, and of other goods belonging to the church was placed under the guardianship of the law in order that those places and things might be used for their destined purposes. Without incorporation there was danger that church property would be lost to its intended purposes, since if the property was held in the name of a particular person, for instance, the bishop or rector, that person was the private owner of the property in the eyes of the law. Accordingly, if he died intestate, his heirs could in virtue of the law claim the property, as reportedly happen in Philadelphia. If he so

[4] Roemer, *loc. cit.*

wished, he could alienate the property and have the protection of the civil law in his favor.[5]

This legal consideration played a paramount role in moving Bishop (later Archbishop) John Carroll of Baltimore (1735-1815) to permit officially the introduction of the trustee system.[6]

> The trustee system was an obvious response to an apparent need. Some one must hold the property for legal purposes, and the simplest system was for the congregation to elect a number of its members to represent it before the courts.[7]

There were also two other considerations which exerted an influence on Bishop Carroll in this matter. First of all, since the faithful sustained the clergy and built their churches with their own contributions, he felt that they should be entrusted with the temporal administration of their churches.[8] Secondly, the participation of laymen in the administration of church property would present to the non-Catholic element of the nation's population a method of administering church goods that was in harmony with the practice of many of the Protestant churches in this regard as well as with the democratic tendencies and traditions of the new republic.[9]

In permitting the introduction of the trustee system, however, Bishop Carroll was undoubtedly aware of the dangers

[5] Cf. a letter of John Anthony Grassi, S.J. (president of Georgetown College, superior of the Jesuits in the U.S., rector of the College of the Propaganda) to the Sacred Congregation for the Propagation of the Faith around 1819 quoted by Guilday, "Trusteeism," *Historical Records and Studies,* United States Catholic Historical Society (New York, 1900-), XVIII (1928), 8, 9.

[6] Heston indicates that the first official beginnings of the trustee system are found in decree n. 6 of the First Diocesan Synod of Baltimore (1791).—*The Alienation of Church Property in the United States,* The Catholic University of America Canon Law Studies, n. 132 (Washington, D.C.: The Catholic University of America Press, 1941), p. 28.

[7] Guilday, *The Life and Times of John England* (2 vols., New York, 1927), I, 353.

[8] Roemer, *loc. cit.*

[9] Heston, *op. cit.*, p. 30.

that surrounded it. Therefore, he wisely insisted that the lay trustees had to keep themselves subject to the ecclesiastical authorities.[10]

On paper and in theory the trustee system was entirely unobjectionable. In practice, however, it so often gave rise to trusteeism, a form of American liberalism, an emotional republicanism, that spelled out undue lay interference in Church government. Essentially trusteeism seems to have consisted in the claim of certain lay groups and their partisans to a wider control in temporal and mixed ecclesiastical matters than the laws of the Church allowed them.[11] Practically speaking, in the early days at least, the original occasion of such encroachment was the desire of the congregations to retain or dismiss a certain pastor whom the ecclesiastical superior wished to dismiss or retain. In not a few instances this occasion led to flagrant insubordination, to open claims by congregations of the actual, not merely the legal ownership of church property and their consequent usurpation thereof, and sometimes even to scandalous schism.[12] Unfortunately, this opposition to recognized ecclesiastical authority—opposition in most cases of a mixed nature, involving racial feelings and the question of the tenure of church property—was perpetrated not only by meddling laymen but at times also by some disgruntled clergyman who had ambitious yearnings of his own and made common cause with the trustees, who were not always practicing Catholics. Still more unfortunate, however, was the fact that

[10] Roemer, *loc. cit.* Cf. Guilday, *The Life and Times of John Carroll, Archbishop of Baltimore (1735-1815)* (Westminster, Md.: The Newman Press, 1954), pp. 782-786; Dignan, *A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)* (Washington, 1933), pp. 67-140.

[11] McNamara, "Trusteeism in the Atlantic States, 1785-1863," *The Catholic Historical Record* (Washington, 1915-), XXX (1944-45), 153.

[12] Maynard, *The Story of American Catholicism* (New York: The Macmillan Co., 1951), pp. 187-196; Guilday, "Trusteeism," pp. 14-73; Guilday, *The Catholic Church in Virginia* (New York: United States Catholic Historical Society Monograph Series VIII, 1924), pp. 63-123.

according to the provisions of the civil law once an organization was duly incorporated in legal form, there was no remedy for any of the acts of the trustees, unless they ran afoul of the laws of the land.

It was with these factors in mind that the bishops of the councils of Baltimore enacted their legislation and issued their pastoral statements in regard to trustees. Little wonder it is, then, that the bishops involved attempted to stamp out the evils of the trustee system by defining, most often in a negative manner, the rights of trustees, by specifying their duties, and by establishing norms for their appointment.[13]

As for the rights and duties of trustees, all of the councils of Baltimore undoubtedly acted upon the principle that the laity enjoy no authority by right in the management of ecclesiastical goods but act always as the subjects of the Holy See or their bishop (III Plen. Cn., (1884) decree n. 285). Thus, at the First Provincial Council (1829) the bishops expressed their very earnest desire that, whenever possible, no church be built or consecrated thereafter unless it had been made over to the local bishop for divine worship and the advantage of the faithful—which act was to be done in writing (decree n. 5—repeated in the II Plen. Cn. (1866), decree n. 183). It was further declared that the trustees had no grounds upon which to claim either the right of patronage or the right of appointing any clergyman to any church or mission or of dismissing him therefrom. Furthermore, they had no right to obstruct the ministry of the duly appointed priest by withholding his support or in any other way (decree n. 6—repeated in the II

[13] The following sources have been used for the various conciliar decrees referred to in this paper: for those of the Provincial Councils of Baltimore and the First and Second Plenary Councils, *Concilii Plenarii Baltimorensis II, in Ecclesia Metropolitana Baltimorensi, a die VII ad diem XXI Octobris, A.D. MDCCCLXVI, Habiti et a Sede Apostolica Recogniti, Acta et Decreta*, 2. ed., Baltimorae: Joannes Murphy, 1877; for those of the Third Plenary Council, *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A.D. MDCCCLXXXIV*, Baltimorae: Typis Joannis Murphy et Sociorum, 1886.

Plen. Cn., decree n. 184).[14] Moreover, if the trustees went contrary to the bishop's will and retained a priest who was unapproved, or deprived of his faculties, or suspended and not yet lawfully rehabilitated, or if they obstructed an approved priest's sacred ministry, the bishop was urged to place the church involved under interdict for as long as the evil persisted, provided other remedies were of no avail (decree n. 8—repeated in the II Plen. Cn., decree n. 186).

Furthermore, the Fathers of the Third Provincial Council (1837) declared that goods which were given by the faithful for pious causes and for the advantage of the Church should be used only for those purposes. Hence, every safeguard under the civil law was to be employed to ensure that the wishes of the donor would be followed. Any cleric or layman who turned these goods to another use laid himself open to the penalties that had been prescribed by the Council of Trent for such misconduct (decree n. 4—repeated in the II Plen. Cn. [1866], decree n. 187).[15]

Another restriction upon the rights of trustees was imposed in the Seventh Provincial Council (1849) when the Fathers of that council declared that all churches and other ecclesiastical goods which had been acquired by way of gift or through the offerings of the faithful and which were to be used for works of charity or religion belonged to the ordinary, unless it was clear from a written statement that these things had been

[14] In their pastoral letter of 1829 the bishops declared that no right of presentation ever existed in the U.S.—Guilday, *The National Pastorals of the American Hierarchy (1792-1919)* (Washington, 1923), p. 33.

[15] The penalties that were prescribed by the Council of Trent for such misconduct were as follows: the guilty person " shall be anathematized till he shall have restored integrally what was seized and furthermore, till he shall have obtained absolution from the Roman pontiff. . . . The cleric who instigates or consents to an execrable fraud and usurpation of this kind, shall be subject to the same penalties, and he shall be deprived of all benefices and be rendered unqualified to hold others; and even after complete satisfaction and absolution, he shall be suspended, at the discretion of his ordinary, from the exercise of his orders."—Schroeder, *Canons and Decrees of the Council of Trent* (St. Louis: B. Herder Book Co., 1941), pp. 158-159.

given to religious for their own use (decree n. 3—repeated in the II Plen. Cn. [1866], decree n. 195). The Third Plenary Council further specified that unless the contrary had been explicitly stated by the donors, gifts, such as furniture, vestments, and vases, which were given to the rector of a church (who was in some cases a trustee *ex officio*) were to be considered church property. Therefore, neither the rector at his departure nor his heirs at his death were permitted to remove or sell them (decree n. 276).

The bishops of the First Plenary Council (1852) clearly defined the position of the lay trustees in relation to their bishop, for they stated explicitly that laymen were not to take any part in the administration of church affairs without the free consent of the bishop (decree n. 16—repeated in the II Plen. Cn., decree n. 197). This ruling applied also to the donors of gifts to the church, since once these benefactors had given their gifts, they could no longer exercise any right of ownership over them. In a word, as far as the administration of church temporalities was concerned, the authority of the Church, the representative and organ of which authority was the bishop of each diocese, was supreme and essential. Hence, without the bishop's sanction no arrangement for such administration, howsoever in itself of a purely temporal nature, had or could have force or validity (the pastoral letter of 1852).[16] Indeed, it was ruled that if laymen usurped any of the bishop's authority and diverted church goods to their own use or in any way frustrated the will of the donors, or if they, even under the cover of the civil law, endeavored to wrest from the bishop's hands what had been confided to his care, such laymen by that very fact fell under the censures constituted by the Council of Trent against usurpers of ecclesiastical goods (the I Plen. Cn., decree n. 16—repeated in the II Plen. Cn. [1866], decree n. 197).[16a]

[16] Guilday, *op. cit.*, p. 185.

[16a] Cf. *supra*, n. 15.

The Second Plenary Council incorporated into its legislation several regulations which had been enacted by the Third Provincial Council of New York (1861) and approved by the Holy See and which had a bearing upon the rights and duties of trustees. According to these regulations trustees had, first of all, no right whatsoever to put any of the church's goods to their own use or to the use of others without obtaining the bishop's permission to do so and without observing the Apostolic constitutions concerning the alienation of ecclesiastical goods. Secondly, trustees had no right to expend a sum of more than three hundred dollars on any particular work without the bishop's written consent. Thirdly, trustees had no right to nominate, appoint, retain, or dismiss a pastor. They had no right to fix the pastor's salary, which right belonged exclusively to the bishop and was to be so recognized by the trustees. They did not have any authority to retain, diminish, or increase stipends. Fourthly, trustees had no right to appoint the organist, singers, sacristan, janitors, school-teachers, and others employed about the church. This right belonged to the pastor. Finally, trustees had no right to make any regulation that affected the parishioners without consulting the pastor (decree n. 201, 2°-6°).[17]

Over and above the duty which the trustees had to subject themselves to the proper ecclesiastical authority and not to claim for themselves rights which the law expressly denied them, one finds several other duties which were specifically set down for them by the Fathers of the Councils of Baltimore.

First of all, trustees, as well as all other administrators of church funds, whether clerics or laymen, were expected to submit an account of their administration, which account was to be demanded every year by the bishops or their delegates (I Plen. Cn., [1852], decree n. 15; II Plen. Cn. [1866], decree n. 196). Secondly, the bishops of the Third Provincial Council in their pastoral letter of 1837 reminded trustees of the need

[17] For an indication of the rights of trustees according to the civil law, cf. Scanlan, *The Law of Church and Grave* (New York, Cincinnati, Chicago, 1909), *passim*.

of providing for every church that furniture for the altar and sacristy which would give to the Mass and to the other divine offices appropriate external dignity.[18] Thirdly, inasmuch as the Third Plenary Council declared that in many provinces the rectors of churches were by the civil law *ex officio* trustees of their churches (decree n. 286), the following prescriptions of that council may be noted here. Rectors were obliged to have a kind a day-book in which were to be recorded all receipts and expenditures, credits and debts, and they were bound to make good any losses that resulted from negligent bookkeeping (decree n. 275). Rectors were to have two lists of all movable and immovable possessions which belonged to the mission or place. These lists were to include mention of of all sacred vessels, of all sacred furnishings, and of everything pertaining to the rectory, schools, and cemetery, and of permanent income and expenses. One copy of this list was to be signed by the rector or the one in charge and by the trustees (or councillors) and sent to the chancellor for the diocesan archives; the other was to be kept in the parish archives. This list was to be reviewed each year by the rector and the trustees and with the acquisitions and expenditures of the current year added thereto, it was to be signed and sent to the chancellor. Whenever an incoming priest took possession of a mission or place, his predecessor or the vicar forane was to show him an inventory of it from the beginning to date (decree n. 276). All important parochial, diocesan, and civil documents were to be kept in an iron safe that was easily accessible to the rector (decree n. 278). Rectors had to obtain the written permission of the ordinary to undertake to build, tear down, notably change, or enlarge a church, a school, or a rectory. Rectors needed the permission of the ordinary also to burden a church or other sacred place with debt (decree n. 279). If priests wished to lend their own money at interest to the church, they had to obtain the written approval of the ordinary for the transaction, and when that approval had been given, a written account of

[18] Guilday, *op. cit.*, p. 109.

the transaction was to be signed by the trustees and put in the parish archives and account book (decree, n. 281). Rectors had to use the greatest care to secure the deeds to all church property. The deeds were to be drawn up under the supervision of experts and in accordance with the requirements of civil and diocesan law. They were then to be placed in the diocesan archives (decree n. 282). All church buildings were to be adequately insured against fire in the name of the corporation or of the ordinary (decree n. 283).

In regard to the appointment of trustees it should be noted that the Holy See condemned the evils of trusteeism, but never the trustee system itself as a way of securing church property against alienation.[19] Moreover, the Fathers of the Third Plenary Council pointed out that the Church had always sought the advice of wise men in managing her temporal affairs (decree n. 284). What is more, in the Fourth Provincial Council (1840) (decree n. 8) and again, by way of repetition, in the Second Plenary Council (decree n. 188) bishops were urged to use every means available to secure church property for its intended purposes—among which means was mentioned the employment of the safeguards which the civil law offered, namely, incorporation through trustees.[20] Accordingly, provision was made in the conciliar legislation of Baltimore for the proper appointment of trustees.

In the First Plenary Council it was decreed that, when the title to a church was in the bishop's name, pastors were not to appoint trustees or permit them to be elected without obtaining the bishop's permission (decree n. 17—repeated in the II Plen. Cn. (1866), decree n. 198).

[19] Cf. Guilday, "Trusteeism," p. 7.

[20] On July 29, 1911, the Sacred Congregation of the Council issued a decree declaring that the vesting of the title to church property in a board of trustees is a preferable legal form, and that in constituting such boards in the U.S. the best method is that in use in N.Y., by which the ordinary, his vicar general, the parish priest, and two laymen approved by the bishop form the corporation.—Manning, "Trustee System," p. 71.

The Fathers of the Third Plenary Council went into greater detail in this matter. Their regulations were as follows: I. It was the bishop's right to decide regarding the necessity and the number of lay trustees and to prescribe the manner of appointing them. II. If they were to be chosen from among the parishioners, their names had to be proposed for that purpose to the bishop by the pastor. III. In whatever manner they were selected, before undertaking their work, they had to be approved in writing by the ordinary; they could be removed by the bishop *ad nutum*. IV. Eligibility to be elected a trustee as well as the right to vote for the incumbents was restricted to the men of the congregation who were over twenty-one years of age and who had made their Easter duty, who held and paid for at least one pew in their own church during the past year or otherwise contributed to the support of the church in the manner prescribed, who had not neglected to send their children to a Catholic school as prescribed, and who were not members of any secret or other forbidden societies. V. The trustees formed a board of trustees with the rector who was president *ex officio* and without whose consent no business might be transacted. (The rector who was *ex officio* a trustee lost this position if he was deprived of or otherwise lost his office of rector. He could appeal to the Holy See *in devolutivo tantum*—III Plen. Cn. [1884], decree n. 286.) VI. If a controversy arose which could not be peaceably settled between the rector and the trustees, it had to be referred to the bishop whose decision was final (decree n. 287—"VI" is found in the II Plen. Cn. [1866], decree n. 201, 6°.).

Thus far the question of the rights and duties of trustees and of their appointment has been treated in the light of the legislation of the councils of Baltimore and of the statements that are found in the pastoral letters that were isssued after those councils. This matter will now be considered in relation to the pertinent prescriptions of the Code of Canon Law.

The Code of Canon Law allows laymen to take part in the administration of church property. Their whole administra-

tion, however, must be conducted in the name of the church, and the ordinary's right of visitation and of demanding a regular account and of prescribing the mode of administration must be safeguarded (can. 1521, § 2). It is the duty of the local ordinary to watch carefully over the administration of all ecclesiastical property in his territory, unless the property has been withdrawn from his jurisdiction (can. 1519, § 1). Accordingly, he is to take care to regulate the entire field of the administration of ecclesiastical property through special opportune instructions given within the limits of the universal law and with due respect to vested rights, lawful customs, and the circumstances involved (can. 1519, § 2). Moreover, besides the diocesan council or board of administration the local ordinary must also appoint some prudent, capable men of good reputation to administer the property of any church or pious place for which the law or the articles of foundation have provided no administrator. After three years the ordinary shall appoint others in their place unless local circumstances make this inadvisable (can. 1521, § 1). A layman cannot be placed in sole control of the administration of ecclesiastical property, but it seems to suffice that a single cleric should be designated.[21] It is to be further noted in this regard that the bishop need not appoint laymen to administer the property of a church or pious place for which no administrator has been provided.[22]

As for the rights and duties of the members of the church council of administration (*consilium fabricae*) canon 1184 provides that they are obliged to maintain a faultless administration of the property of the church in conformity with the requirements of canons 1522 and 1523. They are not permitted, however, to interfere in any way in matters pertaining to the spiritual office and in particular in any of the following mat-

[21] Abbo-Hannan, *The Sacred Canons* (2 vols., St. Louis: B. Herder Book Co., 1952), II, 726.

[22] *Contra* Barrett, *A Comparative Study of the Councils of Baltimore and the Code of Canon Law,* The Catholic University of America Canon Law Studies, n. 83 (Washington, D.C., 1932), p. 198.

ters: (a) the exercises of worship in the church; (b) the manner and the time of the ringing of the bells and rules of order affecting the church and the cemetery; (c) the determination of the manner in which collections are to be taken up, announcements made, or other acts, which take place in church and are connected in any way with divine worship or the church's adornment, are to be performed; (d) the material arrangement of altars, the Communion table, the pulpit, the organ, the organ loft, seats, pews, collection boxes, and other things pertaining to religious exercises; (e) the selection or rejection of sacred furnishings and of other things destined for use, for worship, or for the decoration of the church or the sacristy; [23] (f) entries in parochial registers or in other documents belonging to the parochial archives, as well as the recording system affecting them and the manner of preserving them (can. 1184, nn. 1-6).

Canon 1185 provides that the sacristan, the singers, the organist, the altar boys, the sexton, the grave diggers, and other subordinates, with due regard to lawful customs and agreements and to the authority of the ordinary, are appointed, controlled, and dismissed exclusively by the rector of the church. Canon 1536, § 1, prescribes that unless the contrary be proved, it is to be presumed that donations that are made either to secular or religious rectors of churches are given to the church.

Furthermore, before they take over their post, local administrators who have been appointed according to the provisions of canon 1521 must: (a) take an oath in the presence of the local ordinary or of the rural dean that they will fulfill their office faithfully and well; (b) make an accurate itemized inventory which shall be signed by all the administrators and which shall include all immovable property, all precious mov-

[23] This provision is not contrary to the statement of the bishops in their pastoral letter of 1837, for in that letter they simply remarked upon the necessity of providing suitable furniture for every church. They did not indicate that the lay trustees had the right to select or reject such furniture.—Cf. *supra*, pp. 182-183.

able objects, and all other things, with a description and evaluation of each; or they may accept an inventory that was previously made provided that they check it and indicate the things which have been lost as well as new things which have been acquired. One copy of this inventory shall be filed in the archives of the local administration and another, in the archives of the curia. In both there shall be noted whatever change shall occur in the status of the property involved (can. 1522, nn. 1-3). Likewise an inventory of all church furnishings that are either blessed or consecrated is prescribed in canon 1296, § 2.

Moreover, the general duties of these administrators, all of which arise from their fundamental duty to fulfill their office with the care and diligence of a good family head (*paterfamilias*), are as follows: (a) they must be vigilant that the church property which is entrusted to their care shall not be destroyed or damaged; (b) they must observe the requirements of both the canon and the secular law, as well as those which have been specified by the founder or the donor and those which have been imposed by legitimate authority; (c) they must collect the income and profits promptly and in full, safeguard them, and distribute them in accordance with the intention of the founder or with established laws or norms; (d) they must invest for the benefit of the church itself the money of the church which is left over and above expenses and which can be thus profitably employed; (e) they must keep well posted books of receipts and expenditures; (f) they must put in proper order and file in the archives or in a suitable and adequate safe belonging to the church the documents and the deeds on which the rights of the church are based; (g) where it can be readily done, they must deposit authentic copies of those documents and deeds in the archives or safe of the curia (can. 1523, nn. 1-6); (h) they must pay workmen whom they employ an honest and just wage, allow them suitable leisure time, not divert them from their family cares or efforts to save money, nor impose inappropriate and unreasonable burdens

upon them (can. 1524); (i) they are obliged by their office to give an account of their administration to the local ordinary every year (can. 1525, § 1); (j) they must obtain the written permission of the ordinary before beginning a lawsuit in the name of the church or before acting as defenders in such a suit, or, in a case of necessity they must have the permission of the rural dean whose duty it will be to inform the ordinary at once of the permission given (can. 1526); (k) they must obtain the written authorization of the local ordinary to perform acts that exceed the limits or the method of ordinary administration (can. 1527); (l) even though they are not bound to the responsibility of administration because of the incumbency of a benefice or an ecclesiastical office, if they on their own authority abandon a post which they have expressly or tacitly accepted, with resulting injury to the church, they are bound to make restitution (can. 1528).

In regard to the appointment of trustees the provisions of canon 1521 are applicable to cases in which no administrator has been designated by law, e.g., as in canons 691, 1182, 1476, and 1489, § 3, or by the articles of foundation. Since the pastor is the administrator of the parish which is entrusted to him, canon 1521 does not require the local ordinary to appoint church committeemen to assist the pastor in his administration. The ordinary is free to provide for their appointment in accordance with the discretion which is given to him in decree n. 287, I, of the Third Plenary Council of Baltimore. Moreover, if such provision is made, the norms set down in the aforesaid decree are to be followed, for the Code states simply that unless it shall have been otherwise provided, the members of the church's administrative board are appointed by the ordinary or his delegate and are subject to removal by the ordinary if a serious reason justifies their removal (can. 1183, § 2).

The final point that is to be considered in this paper is the question of how much of the conciliar legislation of Baltimore in regard to trustees, which legislation is particular law, continues to bind in the face of the universal law of the Code in

this matter. The present writer has found only one decree of the councils of Baltimore in this regard that is in opposition to the law of the Code, namely, decree n. 282 of the Third Plenary Council. This decree provided for the filing of the original deeds to church property in the archives of the diocese, whereas canon 1523, n. 6, supposes that copies of these deeds will be filed therein. Therefore, on the basis of canon 6, n. 1, the governing canon in answering this question, this writer submits that since he has found no other opposition in the Baltimore legislation to the law of the Code, the rest of the legislation that was enacted in the councils of Baltimore and approved by the Holy See retains its force either insofar as it has been restated in the law of the Code or inasmuch as it represents prescriptions that transcend the law of the Code. He presents this conclusion notwithstanding Barrett's statement that none of the Baltimore laws are to be set aside because of opposition to the legislation in the Code except that which leaves the bishop free to decide regarding the need of lay trustees, namely, decree n. 287, I, of the Third Plenary Council.[24] It must be noted that canon 1521, the basis upon which Barrett places his conclusion, actually does leave the bishop free to appoint or not appoint *lay* trustees. This fact is clear from the wording of paragraph two of that canon. Moreover, the lawgiver prescribes in paragraph one of canon 1521 only that in the administration of property belonging to a church or a pious place which does not, under the law or the articles of its foundation, have its own administrator, the ordinary shall, in addition to the diocesan council of administration, appoint qualified, practical men of good reputation. These men do not have to be laymen. Hence, canon 1521 does not take away the freedom which the Third Plenary Council gives him in regard to the appointment of lay trustees, who are the only trustees considered in decree n. 287, I.

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[24] *Loc. cit.*

Cases and Studies

THE WESTMINSTER THEATRE LAW *

The attendance of the clergy at theatricals seems to have been a problem for the Church's legislators from the beginning, for in every age one can find legislation about it. In England there was trouble about this attendance even at the height of the Reformation when the faithful were being persecuted and the priests hunted. For example, Father Joseph Cresswell, S.J., Rector of the English College at Valladolid wrote to Cardinal Borghese on April 24, 1616 about Thomas Preston, Superior of the Cassinese Benedictines in England, who was then in the Clink:

> Preston lives like a free man in his prison . . . He goes out when he pleases, and I am informed that some priests who share his views and approve the Oath [1] go out to the theatres, and their prison serves them like a comfortable suite booked at a hotel . . .[2]

Again on March 9, 1617 we find that William Harrison, the Archpriest, made the following legislation:

> For as much as there have been several complaincts made, and advertisement given, that not a few are scandalised, and more disedified by the goeing of certaine Priests to playes, acted by common plaiers upon common stages . . . I do by these absolutely prohibit them, and every of them, under pain of losing ye use of theyre faculties, in the fact itself to be incurred.[3]

* Paper read at the meeting of the *Canon Law Society* in England, held in London, January, 1958, by the Reverend Gerald Moverley, J.C.D., Chancellor of the Diocese of Leeds.

[1] The Oath of Allegiance became law on June 25, 1606. It required Catholics to declare among other things that belief in the deposing power of the Popes was "heretical and damnable", and was thus designed to attack the Catholic body at a most sensitive point—that of loyalty to King and Country. The Jesuits always upheld that it was unlawful to take the oath.

[2] Public Records Office, 31/9/121A (Roman Transcripts). Cfr. Webb, W.K.L., *Thomas Preston—alias Roger Widdrington* in *Biographical Studies 1534-1829*, Vol. 2, n. 3.

[3] Cfr. Semper, I. J., *Jacobean Playhouses and Catholic Clerics* in *The Month*, July, 1952. This prohibition and the ensuing controversy, discussed in the above article, is given in a manuscript (4787) which is preserved in the Folger Shakespeare Library of Washington, D. C.

You will see that this prohibition is remarkably similar to the present law of the Westminster Councils. It was supposedly directed against three priests, Mr. Thomas Leke, Mr. Thules, and Mr. Cannon, but from the force of the reaction to it, it would seem that it concerned many more. Mr. Leke (who was also a prisoner, but allowed abroad in the daytime) protested strongly to the Archpriest, pointing out that the Benedictines and Jesuits were not forbidden to go to theatres, that the prohibition is a violation of clerical liberty, and finally questioning the authority of the Archpriest to issue the prohibition with a grave penalty.[4] A long and exhaustive reply was given by Fr. Colletan, an assistant to the Archpriest, but the outcome was that Fr. Harrison withdrew the prohibition, for he never anticipated that " There would be such an alarm sounded, such a tumult raised, such ruffling, such storming, such siding, such taking parts, such soliciting of others to join in an appeal, as there was to the astonishment of manie."

This dignified and graceful repeal marked the end of legislation as such on this question for about 150 years.

On May 30, 1753 Pope Benedict XIV addressed an encyclical letter *" Apostolicum ministerium "* to the Vicars Apostolic and secular and regular clergy of England,[5] the purpose of which was to compose the terrible quarrels[6] which divided the clergy, particularly regulars and Vicars Apostolic. In § 18[7] he laid upon the Vicars Apostolic the obligation of seeing that the secular clergy lived upright lives as an example to all, and he specifically mentioned three things to be avoided, one of which was public pleasure gatherings. The Vicars Apostolic were not slow in putting these recommendations into practice. Bishop Petre and his Coadjutor, Bishop Challoner, added to the letter granting faculties an Instruction which

[4] In fact the Archpriest had no authority to make laws as distinct from rules which he could make, nor to suspend. Cfr. Hughes, P., *Rome and the Counter Reformation in England,* p. 296.

[5] *C.I.C. Fontes,* No. 425.

[6] Cfr. Hughes, P., *Op. cit.* p. 389.

[7] § 18- . . . Sedulo igitur incumbant Vicarii Apostolici, ut Missionarii Saeculares probe honesteque in omnibus se gerant, quo aliis bono exemplo sint; et imprimis Sacris Officiis celebrandis opportunisque Institutionibus populo tradendis, atque infirmis opera sua sublevandis praesto sint, ut a publicis otiosorum coetibus, et cauponis omnimode caveant; addita etiam suspensionis poena cuilibet, si quis ad easdem divertere non vereretur.

stated that under threat of suspension *ferendae sententiae* Priests were forbidden to go to comedies or any theatrical spectacle or be associated with any public pleasure gatherings or games.[8]

But the legislation which has a direct bearing on the Theatre Law of the Westminster Councils came from the so-called Synod of Winchester.[9] On May 22, 1803, John Milner was consecrated Bishop of Castabala and Vicar Apostolic of the Midland District.

The Vicars Apostolic and the clergy present took the opportunity of holding what Bishop Douglass in his Diary designated as a Synod, from May 23 to May 25.

At the second session Bishop Milner proposed " to the consideration of their Lordships the ambiguous clause of the Instruction which was attached to the form of the faculties by which Priests of the Secular Clergy are forbidden to go to plays. Considering the ambiguity of the clause, and the unhappy practice of some clergymen who are known to have frequented the Theatres, it was judged proper to express the prohibition in precise terms under pain of suspension *ipso facto* against those who violate it." But the Bishops had not yet decided either the wording of the prohibition, nor when it was to appear. On Whit Sunday, May 29, 1803, Dr. Poynter was consecrated Bishop of Halia and Coadjutor of the London District in the Old Chapel of St. Edmund's College.

On the following day, " The four Vicars Apostolic of the four districts, with the Coadjutor of the London District (Bishop Poynter) and the Rev. Dr. Coombes (Vice-President of St. Edmund's College) assembled at Old Hall Green to deliberate further on certain points of ecclesiastical discipline, in an appendix to the late Synod ".

" At last the revised Instructions appeared on January 1, 1804, when Bishop Douglass issued *Facultates et Observanda in Districtu Londinensi.* After a list of the faculties granted come the agreed Rules signed by the four Vicars Apostolic, *Observanda omnibus sacerdotibus ad sacras missiones in nostris districtibus admissis.*"

[8] Quapropter Apostolicis monitis excitati, prohibemus sub poena suspensionis a nobis infligenda, omnibus Missionariis Saecularibus, ne cauponas absque necessitate frequentent; multoque magis ne in iis vespertinas horas compotando, aut chartis ludendo insumant; ne comoediis, aut aliis theatrorum spectaculis, unquam intersint.

[9] Cfr. the article by the late Archbishop Myers, *The Theatre Law of the Old Province of Westminster* in the *Clergy Review,* Vol. III, p. 89 ff.

Section XIV quoted Bishop Petre's *Monita* § 2 word for word,[10] and continued " All priests are most gravely warned to avoid these things. They must know however that under pain of suspension automatically incurred by secular priests and therefore under pain of mortal sin, any priest is forbidden to be ever present at comedies or other public scenic plays in our districts. Other public gatherings in the London District at which it is forbidden for a priest to be ever present under the same penalty of automatic suspension are: Vauxhall, Opera-houses, Play-houses, and all other places in Histrionic Exhibitions; also public oratorios in the evening, Public Concerts in the evening; and all other places of entertainment and amusement where entrance money is received, and which take place in the evening, save only where literary or philosophical subjects are the sole causes of assemblage."

This was the law which remained in force until the Provincial Council of 1852, a law of extraordinary strictness which covered nearly every possible form of public entertainment.

As you know, Pope Pius IX by the Apostolic Letter " *Universalis Ecclesia* " even on September 29, 1850, restored an Episcopal Hierarchy to England. In this Apostolic Letter, the Pope abrogated any particular constitutions, privileges and customs which had obtained up till then in either pre-reformation or post-reformation times. This included " *Apostolicum ministerium* ". The Bishops were completely free to reorganize the pattern of the Church in England according to their new position as residential Ordinaries.

To do this they met in Provincial Council on July 5, 1852, at St. Mary's College, Oscott. The second canon of Decree XXIV of this Provincial Council of Westminster reads:

> Prohibemus districte, ne ecclesiastici sacris ordinibus initiati, scenicis spectaculis in publicis theatris intersint, imponentes transgressoribus poenam suspensionis ipso facto incurrendam, hactenus ubique in Anglia vigentem, cum reservatione respectivo Ordinario.

[10] § II.- Longe denique a nobis abigatur desidia, vitiorum omnium parens; turpissimum enim est sacerdotes (qui caeteris fidelibus praeire et praelucere deberent in arcta et laboriosa salutis via, eosque verbo et exemplo ad Christianae perfectionis studium excitare) desidiosam vitam agere, somno indulgere, aut pretiosum suum tempus prodigere in popinis, vel aliis domibus publicis, in nocturnis compotatorum societatibus, in aleae aut chartarum lusu, in spectaculis profanis, in ludis publicis, in venatione et similibus, quae omnia, tamquam statum ecclesiasticum dedecentia, clericis per sacros canones interdicta sunt.

This law was amended at the Fourth Provincial Council held in 1873 by the addition of a clause: "*vel in locis theatri publici usui ad tempus inservientibus.*" So that the law as we have it today reads:

> Prohibemus districte, ne ecclesiastici sacris ordinibus initiati, scenicis spectaculis in publicis theatris, vel in locis theatri publici usui ad tempus inservientibus, intersint, imponentes transgressoribus poenam suspensionis ipso facto incurrendam, hactenus ubique in Anglia vigentem, cum reservatione respectivo Ordinario.

Obviously there had been discussion and interpretation already, and that interpretation continues until today, so much so that in many clerical minds the Westminster Councils and the Theatre Law are almost synonymous. To see what this means today, one hundred years after it was given, I propose first to discuss briefly the efficacy of the law today, secondly to interpret its prohibition, and thirdly to consider its sanction.

Efficacy. I do not think there is any doubt nowadays about the Theatre Law being a true law. It certainly fulfils St. Thomas Aquinas' classical definition, "*ordinatio rationis ad bonum commune ab eo qui curam habet communitatis promulgata.*"

There was at one time some discussion about the effect of the division of the Province of Westminster into three provinces by the Apostolic Constitution, "*Si qua est*" of October 28, 1911,[11] and later into yet one more province by the Bull, "*Cambria celtica*" of February 7, 1916.[12] As you know some tried to argue that the effectiveness of the Canons of the Westminster Councils was now confined to the territory of the much reduced Province of Westminster. As clerical discussion went to and fro, the new Code of Canon Law was awaited to see what light it would throw on this question. But c. 291, § 2 did not solve it. Since the matter of the force of the decrees of the Westminster Councils was too important for the Church in England and Wales to leave in doubt (for they contained decrees of much more vital importance than the Theatre Law), a definite answer was required, and so a *dubium* was sent to Rome. It was asked whether the laws and decrees of the Four Westminster Councils still obliged as they did before the division of the Province, or whether they ceased to have juridic force in the newly erected Provinces. On August 2, 1918, the Sacred Consistor-

[11] *AAS*, Vol. III, p. 554.

[12] *AAS*, Vol. VIII, p. 257.

ial Congregation replied: " In the affirmative to the first part . . . in the negative to the second ".[13]

The question was solved. The Westminster Law still covers the original territory of England and Wales.

Some hoped that the Code of Canon Law would perhaps abrogate previous legislation, or at least modify the old law. But with regard to the Theatre Law, it is quite clear that it is in conformity with c. 140, therefore not opposed to the prescripts of the Code, and therefore not only not abrogated but still retains its force. (Cfr. c. 6, 1°.) Furthermore canon 22 says: " with the exception of c. 6, 1°, a general law in no way suppresses the statutes of special places and particular persons, unless it expressly says so ". It is quite evident then that the Theatre Law retains its full efficacy today. But it should be noted that the pre-Code particular law, which binds today only in so far as it was re-issued by the Code, retains the authority who made it as the source of its legal force. Only in a negative or permissive sense does it bind on the authority of the Code, i.e. in so far as the Code has seen fit to leave it untouched. It receives no positive authority from the Code. It is in force today with the same efficacy and in virtue of the same authority as it had when it was first issued.

Prohibition. To decide what the law prohibits and whom it affects we have certain guides from the Code itself in cc. 18 & 19. We have to interpret the law according to the proper meaning of the words taken in their text and context, and we have to do so strictly because since the law contains a penalty and a restriction of liberty, we are *in odiosis* and " *Odia restringi et favores convenit ampliari* ".[14] But we have also got a practical guide to the interpretation of the Theatre Law given by the Hierarchy at several Bishops' Meetings, they are:

a) Plays performed by school children, even those to which the public are admitted by payment, were not included in the Synodical prohibition. (Bishops' Meeting, 1890)

b) Amateur Theatricals, performed by others than mere children, even for the benefit of a charity, in a public hall whether licensed or unlicensed, came under the law. (Bishops' Meetings, 1890)

[13] *AAS*, Vol. X, p. 365.

[14] Reg. 15, R.J. in VI°.

c) Plays acted in school buildings, even by adults, do not come under the censure. (Bishops' Meeting, 1905)

d) Plays acted in parish halls, even by adults, do not come under the censure. (Bishops' Meetings, 1932)

e) In view of the answers received from the Holy See, the Bishops are unanimous in holding that the censure still applies in the case of those in sacred orders who are present at scenic representations in public theatres or places used as such. The Province of Westminster embraced the whole of England and Wales, and the S. Consistorial Congregation has decided that the law still binds throughout England and Wales and is not confined to the present Province of Westminster.[15]

Here we have a valuable guide to the meaning of the Theatre Law, though we must remember that these Episcopal Interpretations do not have the force of cc. 18 & 19, for a Bishops' Meeting cannot be an authentic interpreter of a provincial synod; only another synod or higher legislative authority can be that.

The Theatre Law forbids the clergy to be present at "*scenicis spectaculis in publicis theatris vel in locis theatri publici usui ad tempus inservientibus*".

(a) *What is a "scenic spectacle"?*

I think it is obvious that "props" and scenery are merely accidental; for example Shakespeare's plays remain scenic spectacles whether elaborately performed, or whether presented without any scenery at all. To my mind a scenic spectacle is one which transports the spectator from the present to other circumstances, time or place, true or imaginary, serious or farcical, so that a different scene from the present is formed on his imagination. In practice a scenic spectacle means more or less a stage play. And I think this interpretation is confirmed by the use of the word "plays" in the Episcopal Interpretations.

(b) *What do we mean by "a public theatre"?*

Some have tried to argue that since the Act of Parliament of 1843 [16] required various licenses for the various types of theatres,

[15] Cfr. *Decrees of the XXXII Synod of the Diocese of Middlesbrough* (1933), Lib. II, tit. I, n. 23, where these episcopal declarations are collected together.

[16] The Theatres Act, 1843, 6 & 7 Victoria, Cap. 68.

halls etc., it can be presumed that the Westminster Fathers knew of this recent legal distinction of theatres, music halls etc., and therefore the law concerns only theatres with a specific theatre license. But surely we must have here recourse to c. 18 and follow the normal meaning of the word, not its nice civil law definition; and in any case, argument based on types of civil licenses must fall to the ground when it is realised that the owner of a public theatre or hall nearly always safeguards his position by taking out all the necessary licenses for all types of public entertainment. By using the word " halls " in their interpretations, the Bishops show that they interpret the word " theatre " in its larger general meaning. But we must remember that the law refers to public theatres or places temporarily used as public theatres, and does not concern any performance given in a private theatre or hall.

This surely is the reason why the Bishops said that plays given in school buildings or parochial halls do not come under the censure. But because of the " temporarily used " clause, we should remember that a private hall *could* come within the ambit of the Westminster Law, for example, if it were rented by a public theatre owner for a public stage presentation. But vice versa, surely a public hall could become temporarily a private one. For example, if it were rented by a parish because its own hall was either deficient or non-existing, then does not this public hall become temporarily a private parochial hall? So we are led to the conclusion that the mode of renting a hall can decide whether the presentation in it is forbidden to the clergy or not by the Westminster Theatre Law.

(c) *Stage Plays*

It seems quite clear that all types of stage plays, whether they be drama, pantomime, opera, or ballet, are forbidden by the Westminster Theatre Law. But there is one exception, for the first Episcopal Interpretation of 1890 says that the law does not apply to plays acted by school children. (I think that this interpretation is an attempted authentic restrictive interpretation which is beyond the power of a Bishops' Meeting, for the law itself does not make this exception; but still by *epikeia* we can use it).

The second interpretation, however, says that amateur theatricals performed by others than school children do come under the law. How are we to define school children and/or mere children?

Since the general school-leaving age is 15, I think we can say that all children up to that age are both school children and mere children. But what about the large number who remain at school until they are 18 years of age? You could call them school children, but hardly mere children, and therefore it is lawful for the clergy to attend plays presented by them according to the first Bishops' Interpretation, but unlawful to do so according to the second! Shall we leave it like that? Or shall we make a general rule that the Theatre Law forbids the clergy to be present at stage plays in public theatres or halls, unless the play is given by young people up to the age of 18 years, or unless the hall has been hired by a parish or school?

(d) *What about Music Halls?*

As I have said, I just dismiss any argument from civil licenses, but I submit that the variety type of music hall is not a scenic spectacle. It is a series of performances by separate artists displaying their skill in various forms of entertainment. It does not transport the spectator to other circumstances or depict a theme. So I submit that the variety music hall does not come under the law even if one or two of the acts are short sketches for *de minimis non curat praetor.* Perhaps the very elaborate type of music hall might come under the law; I do not know. But at any rate, it should be remembered that even if music hall variety shows are not forbidden by the Westminster Theatre Law, they may be forbidden by the general prescripts of canon 140 and the natural law.

(e) *To whom does this law apply?*

According to c. 13, § 2, it applies to those " for whom it was made, who have either a domicile or quasi-domicile in the territory, and who are actually staying there, without prejudice to the prescripts of can. 14." Obviously then residential clergy in Major Orders, both secular and non-exempt religious are bound by the Theatre Law. Exempt religious and clergy visiting England and Wales would be bound by this law only if it concerned public order according to c.14. To decide whether the Theatre Law is one of public order is most difficult. According to Michiels [17] *a law promoting*

[17] Michiels, G., O.F.Min.Cap., *Normae Generales Juris Canonici,* Vol. I, p. 392, n. 3.

public order according to c. 14, § 1, 2° must be of such a nature that its scope is so concerned with public order that any contravention by anybody would cause such a disorder as to endanger the organisation, which has been judged necessary to attain the common good in this particular territory. Whether the Theatre Law is such a law has been argued backwards and forwards:

1) according to the scandal motif;
2) according to its having a vindicative penalty;
3) according to the text of the law.

But none of these arguments is definitive. I submit, however, that the context of the law does decide the matter, for there is an introductory prologue to Decree XXIV of the First Westminster Council, in which c. 2 is the original Theatre Law, and its whole theme is that the laws of this decree are given in order that the clergy may be more holy and thus better pastors of the flock.

So it seems to me that the Theatre Law is given for the sanctification of the clergy, and it is not motivated by public order. So a visitor is not bound by it, nor are exempt religious, for the latter are exempt from the observance of provincial law, as they are from diocesan law, unless such law is made in accordance with those laws of the Code which give the local Ordinary authority over exempt religious, or unless there is some other legal or extrinsic title by which a provincial council can legislate for them. As c. 140 is not such a law, then the Theatre Law does not concern exempt religious. There is no extrinsic title, since the Theatre Law does not concern public order; nor were the decrees of the council confirmed by the Holy See *in forma specifica.*

(f) *Military Chaplains*

There is one section of the clergy to whom I would like to refer, namely to Military Chaplains; for as you know, on November 21, 1953, the S. Consistorial Congregation established a Military Vicariate for the Armed Forces of this country.[18]

The Military Vicar enjoys ordinary and personal jurisdiction over all persons connected with the Armed Forces, but his jurisdiction is special, for it is cumulative with that of the local Ordinaries. For this reason § 10 of the Decree says that the " Military Chaplains,

[18] *AAS,* XXXXVI, p. 144.

whether Major or Minor, are subject, as regards ecclesiastical discipline, to the power of the Ordinary of the place where they happen to be ".[19] So Military Chaplains are subject in disciplinary laws, both to the Military Vicar and to the local Ordinary. Accordingly, since the Theatre Law is certainly a matter of ecclesiastical discipline, we conclude:

1) If the Military Vicar imposes it on his chaplains, then all of them, secular priests and exempt religious, are bound to observe it.
2) If the Military Vicar does not impose it on his chaplains, then
   (a) All Military Chaplains who are secular priests or non-exempt religious are bound by it everywhere in England and Wales.
   (b) Those Chaplains who are exempt religious are not bound by it.

The fact that Military Chaplains are so subject to the local Ordinary has special consequences for them as regards the sanction of the law, as we shall see.

Penalty. For the sake of clarity, I give again the wording of the sanction:

> *. . . imponentes transgressoribus poenam suspensionis ipso facto incurrendam, hactenus ubique in Anglia vigentem, cum reservatione respectivo Ordinario.*

First we must note that the sanction is one of automatic suspension. It is incurred by the very act of transgression of the prohibition. Also, since it is not qualified in any way, it means full suspension both from office and benefice (c. 2278, § 2), i.e. the one who incurs it is forbidden to exercise Holy Orders and to perform any act of jurisdiction or of administration of his benefice, and moreover he is deprived of the fruit of his benefice.

The second point to note is that this suspension is referred to as " *hactenus ubique in Anglia vigentem* ". We must know what is the meaning of this.

The words mean that the Council imposed the penalty of suspension just as it had been imposed before throughout England and

[19] *Ibid.* § 10- . . . Cappellani militum sive Maiores sive Minores, quoad ecclesiasticam disciplinam, potestati quoque Ordinarii loci, in quo versari contingant, subiiciuntur.

Wales. Taken on its face value this would seem to raise no problem, but if we investigate *how* the penalty of suspension had hitherto prevailed throughout England and Wales, then it will be seen that the words have important consequences.

It will be remembered that the Theatre Law in force in England and Wales prior to the Westminster Councils emanated from the so-called Synod of Winchester. Through a decision taken at this synod a uniform Theatre Law was issued for the four districts covering England and Wales, and automatic suspension was introduced for the first time.

But though Bishop Douglass referred to the deliberations of the Vicars Apostolic at Winchester as a synod, there can be no doubt that it was not in fact a synod. It could not be a provincial synod, because there was no ecclesiastical province in England at that time.[20] And furthermore the decisions arrived at were certainly not sent to Rome for confirmation. The Synod of Winchester was no more than a Bishops' Meeting, and as we have shown, a Bishops' Meeting has no proper jurisdiction of its own. As a result the Theatre Law which the Vicars Apostolic agreed to put into effect did not have the force of Provincial Law. It did not obtain legal efficacy from one supra-diocesan authority, but it came into force in each District on the authority of each respective Vicar Apostolic. It was uniform throughout the country because the Vicars Apostolic agreed that it should be so, but nevertheless it bound only because and in so far as each Vicar Apostolic agreed to put it into effect in his own district, and so *per se* it only bound the subject within the district of his own Vicar Apostolic.

The Vicars Apostolic themselves asknowledged that this was so, for when in 1838 they decided to extend the law to all clergy in Major Orders, there was no question of another synod, but it was done by a collective document signed by the four Vicars Apostolic, Baines, O.S.B., Walsh, Briggs and Griffiths, on May 4 of that year.

Now the Theatre Law of the Westminster Councils states that the suspension it imposes is imposed as it had hitherto prevailed in England. Hitherto it had prevailed through the authority and jurisdiction of each Vicar Apostolic in his own district. So it would seem that the words "*hactenus ubique in Anglia vigentem*" mean

[20] Cfr. Vermeersch, A., S.J., in *Periodica de Re Canonica et Morali*, t. 9, (1921) pp. 32-33.

that the Council intended the censure to oblige on the authority of each Bishop in his own Diocese.[21] Thus we have the remarkable position that the prohibition of the Theatre Law is provincial law simply and binds throughout the whole of England and Wales, but the sanction of the law is, on the authority of the Council, in fact diocesan law. In practice this means that when an English diocesan priest goes into another English diocese, he is still within the territory of the law with regard to the prohibition, *but so far as the sanction is concerned he is a peregrinus.*

This opinion was insinuated by Msgr. Myers in his article on the Theatre Law of the Old Province of Westminster, which appeared in the February 1932 issue of the *Clergy Review*, but he did not actually draw the conclusions. The conclusions were drawn, and attacked, by Msgr. Charles Cronin, Vicar General of the Archdiocese of Birmingham, when he replied to Msgr. Myers in the same *Review* the following month.

Msgr. Cronin maintained that such an interpretation of the "*hactenus*" clause was unthinkable, and supported his views with two main arguments. First he said, "If all this were true, the Catholic Church in England would have been, as regards this piece of legislation, in a false position for the last 80 years (this was written in 1932) without knowing it and without Rome's knowing it". This is impossible, he said, because "although correction and confirmation of the acts of a provincial council by the Holy See do not raise those acts to the rank of Pontifical laws, they do give us a guarantee that the decrees of the council do not contain any stupid blunders that would nullify its legislation and make the whole proceedings ridiculous".

Secondly, he said that the "*hactenus*" clause was in reality no more than a passing historical reference, and to support this contention he pointed out a) that the Council used the word "*imponentes*" not "*prorogantes*" or "*renovantes*" when giving the sanction; b) that the "*hactenus*" clause is cut off from the rest of the

[21] There can be no question about the fact that the bishops of the newly erected hierarchy were the direct successors of the Vicars Apostolic, for this was one of the chief items of discussion between 1847 and 1850 because the bishops wanted it to be quite legally certain to avoid any difficulties concerning bequests, pious foundations, etc. Cfr. *Acta Sac. Congregationis de Propaganda Fide*, 1847-1850.

text by commas both at the beginning and at the end of it; c) and finally that the sanction is not of the same species as the previous one, though of the same genus, since it is now reserved, whereas before the Councils it was not reserved. Msgr. Cronin rounded off his argument by quoting a letter from Cardinal de Lai of the S. Consistorial Congregation, the last paragraph of which reads, " Therefore, in the example given by Your Excellency, the priest of one province who, contrary to the prescript of the First Westminster Council, Decree XXIV, 2, betakes himself to a theatre in another, is subject as before to the *poenæ suspensionis ipso facto incurrendae hactenus ubique in Anglia vigenti, cum reservatione respectivo Ordinario.*" [22]

Powerful arguments they are indeed, but do they decide the issue and prove that the censure binds all over England and Wales in the same way as the prohibition? We think not.

1) In the first place, it is hardly exact to say that our interpretation of the " *hactenus* " clause would mean that the Catholic Church in England would have been in a false position as regards this piece of legislation, because in fact the precise meaning of this legislation

[22] Epistola S. Congregationis de vera significatione decreti supra relati diei 2 augusti 1918.

Ill.mo e R.mo Signore,

Il dubbio sorto dopo la dichiarazione del 2 Agosto 1918 di questa S. Congregazione, circa le leggi e i decreti dei quattro Concilii Provinciali di Westminster, e dalla S.V. R.ma a me riferito il 12 settembre p.p. colle parole: " Ove la legislazione Wèstmonasteriense rimanga soltanto provinciale, le leggi non toccano che i proprii sudditi nelle relative provincie " nasce da un'inesatta interpretazione.

I Concilii provinciali di Westminster non sono stati revocati; nè la divisione dell'antica provincia di Westminster in quattro nuove provincie li ha implicitamente annullati. Sussistono quindi nei termini espressi dalla dichiarazione concistoriale del 2 Agosto; sussisteranno, sino a che le nuove provincie non facciano un nuovo sinodo, e in esso modifichino le prescrizioni degli antichi; e, rimanendo sussistenti, lo rimangono in quella forma ed estensione che ebbero al loro apparire.

Ecco perciò che nell'esempio dalla S.V. allegato il Sacerdote di una provincia che, contro il prescritto del primo Concilio Westmon. Decr. XXIV, 2, si reca in un teatro altrove, va soggetto, come per l'innanzi alla " poenae suspensionis ipso facto incurrendae, hactenus ubique in Anglia vigenti, cum reservatione respectivo Ordinario ".

Mi volga dell'incontro, ecc.

G. Card. De Lai, Vescovo di Sabina, Segret.

has been repeatedly questioned from its very beginning, as witness the Episcopal Interpretations, the *dubium* of 1918, and various questions and answers in the *Clergy Review*.[23]

2) Secondly, we maintain that Cardinal de Lai's letter neither proves Msgr. Cronin's interpretation nor disproves ours.

The first thing to note about the letter is that it is a private reply, and so " does not have the force of law, and only binds the persons and concerns the things for which it is given." (c. 17, §3.) Secondly, it is concerned with a matter different than the interpretation of the censure. We have not been able to discover who was the recipient of the letter nor the text of the petition which Cardinal de Lai refers to as sent on September 12. But in the Archives of the Archdiocese of Westminster there is a copy of a letter[24] from Cardinal Bourne to Cardinal Gasparri dated July 19, 1918, which appears to be the occasion of the Consistorial decree of August 2, 1918. Cardinal Bourne wanted a settlement of the doubt about the extension of the decrees of the Westminster Councils after the division of the Old Province of Westminster, and particularly in relation to the Theatre Law, for § 3 and § 4 of his letter mentioned that some priests and religious were acting on the theory that the

[23] E.g. *Clergy Review*, Vol. XIII, p. 391; Vol. XIV, p. 265; Vol. XXIII, p. 279; Vol. XXVI, p. 266.

[24] Le 19 juillet 1918.

Eminentissime Seigneur,

Les Evêques mes collègues prient le Saint Siège de donner une déclaration explicite sur la question très importante qui suit:

1. Avant 1911 il n'y avait qu'une seule Province Ecclésiastique pour l'Angleterre et le pays de Galles. . . .
2. Depuis 1911 . . . plusieurs Provinces.
3. Maintenant il y a des prêtres qui soutiennent qu'a cause de cette multiplication des Provinces les décrets des quatre Conciles n'ont pas la même force obligatoire qu'ils avaient autrefois.
4. Ils citent surtout le décret XI no. 9 du IVme Concile. Ils soutiennent qu'un prêtre de la Province de Liverpool peut aller au théâtre dans la Province de Birmingham sans encourir la peine de suspense. Déjà des prêtres et mêmes des religieux profitent de cette interprétation pour aller au théâtre quand ils sont dans une autre Province.

Votre Eminence comprendra facilement les conséquences déplorables de cette manière d'argumenter et d'agir. Une déclaration explicite du Saint Siège que les quatre Conciles Provinciaux avaient en réalité la valeur d'un Concile National, et que les décrets obligent depuis 1911 comme avant 1911, mettrait fin à ces incertitudes et empêcherait des difficultés et des scandales.

scope of the Westminster Councils had changed with the creation of the new provinces and were actually going to the theatre when in another province.

The decree of August 2, 1918 settled the general question about the effect on the provincial law of the creation of the new provinces, but did not specifically apply its decision to the Theatre Law. So it would seem that a further question was put to Rome, perhaps by some other member of the hierarchy, in order that a definite reply on this particular point should be received. The reply of Cardinal de Lai thus concerned the Theatre Law from the point of view of the creation of the new provinces. It asserted, in effect, what was contained in the decree of August 2, 1918, that the Theatre Law bound throughout England and Wales, but it did not define, since it was not concerned with, the operation of the censure. In this regard it defined nothing, particularly since it, too, repeated the "*hactenus*" clause. Thus the private reply of Cardinal de Lai is of little value with regard to the question under discussion.

3) Thirdly we agree that the "*hactenus*" clause is a historical reference; that is precisely the foundation of our argument.

4) Fourthly, we simply deny that this interpretation is either ridiculous or a blunder. On the contrary, we think it was intended. For why was the "*hactenus*" clause put into the Theatre Law at all? The Westminster Fathers must have known that this law would be carefully scrutinized. They would know that every word counted, since the law is '*odiosa*'. They knew that they had full authority to impose a censure; that by simply omitting this clause, it would be absolutely clear that the sanction was imposed in the same manner and to the same extent as the prohibition. There must have been a very good reason to insert the "*hactenus*" clause. What was it?

We conjecture that the Westminster Fathers were not in agreement among themselves about the desirability of attaching the penalty of automatic suspension to the Theatre Law; and we have good grounds for this conjecture. It is quite clear that the very severity of the wide-ranging prohibition of the 1804 law led to the neglect of its prohibitions. On April 20, 1842, we find Bishop Griffiths issuing *Alia Observanda in Districtu Londinensi*, § VII of which reads as follows: "Since it has been made known to us that some priests are anxiously doubting about the effect of inflicted suspen-

sion (XIV *Observanda*), namely whether the Sacrament of Penance is invalidly administered by a priest so suspended, we declare that the absolution given with common error is valid though unlawful." [25] For this and other reasons it is not beyond the realms of probability to suppose that some bishops thought it would be more prudent at least to modify if not abolish the penalty of automatic suspension. We do know that the desirability of a new edition of the *Observanda* came up regularly at Bishops' Meetings from 1833 onwards, though nothing was done about it; [26] so there must certainly have been much discussion about the Theatre Law at the Council.

So the reason why the "*hactenus*" clause was inserted into the law would appear to be, to arrive at a compromise between opposing opinions, and by this clause leave the matter of the suspension to the judgment and discretion of each individual Ordinary.

In practice then this interpretation means that the Theatre Law has the following effects:

1) All those who are subject to the provincial law by reason of domicile or quasi-domicile, are bound to observe its prohibition throughout England and Wales, and that under pain of mortal sin; for it follows from the fact that a censure is attached that the law concerns grave matter.
2) On the assumption that the Ordinary wishes the censure to bind in his diocese, then his subject incurs suspension if he breaks the law in his diocese.
3) If he goes outside his own diocese then he remains subject to the prohibition, but becomes a *peregrinus* as far as the suspension is concerned. If the Ordinary of the place to which he goes does not enforce the censure, then such a transgressor is not suspended. But even if the Ordinary does enforce the censure, then such a transgressor is not suspended, since the Theatre Law does not concern public order.
4) Since Army Chaplains are subject to the Ordinary of the place wherever they happen to be, those who are subject to the Law would incur the suspension wherever in England or Wales they broke it, if either the Military Vicar or the local Ordinary enforces the censure.

[25] Cfr. Myers, *op. cit.*, p. 101.

[26] Cfr. Myers, *ibid.*

5) Those who are not subject to the prohibition, e.g. *peregrini* to England and Wales and exempt religious, are obviously not subject to the suspension.

Finally we must note that the censure, if incurred, is reserved "*respectivo Ordinario*". This could mean that the censure is reserved to one's own Ordinary, but in that case we would have to admit that we have an altogether special kind of censure operative in England and Wales. For we should have a censure imposed "*a iure*" but reserved "*proprio Ordinario*"; and it is apparent from cc. 2245 and 2253 that such a type of censure is unknown to the Code.

But in fact the term "*proprio Ordinario*" was not used, and the term "*respectivo Ordinario*" can have another meaning. It would appear to have been used with the English meaning of "respective Ordinary", and is thus patient of the meaning that the censure is reserved to "the Ordinary whom it may concern". So I conclude by using the words of the late Canon Mahony: "In our opinion there is a grave doubt whether the suspension is reserved to each one's Ordinary, and our conclusion must be that not only the proper Ordinary of the delinquent, but any Ordinary in whose territory the delinquent happens to be as a *peregrinus* can validly and lawfully absolve from this censure." [27]

It has been established that the Theatre Law is still in force, and I have tried to see to what it applies in the modern day. But since the law was not made for modern conditions, there are some very obvious anomalies in its practical application. Furthermore, even the censure which is attached to the law is not without the range of contention. We may well feel then, that a more adaptable legislation on this matter is called for.

In the meanwhile we must take the law as it is, and in following it we should do well to listen to the advice of the Council:

Dilectissimum ergo clerum peramanter in Domino hortamur ut, praedictas inhibitiones non tantum secundum litteram, sed etiam secundum spiritum pie interpretantes, easdem sancte observent. (IV Conc. Prov. West., D. XI, c. 10)

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[27] Cfr. Mahony, E. J., *Questions and Answers* in *The Clergy Review*, Vol. XIII, p. 391.

SECULAR INSTITUTES *

. . . Existentialism, that philosophy of despair, speaks in its own way of the disorganization and the pain suffered by a generation which has lost its sense of the infinite. It speaks of a great need of God, of the " living " God. Souls await a powerful witness. But the witness of speculative thought is not enough for them, while that of works of charity does not touch them as it used to do. What would reach them effectively would be the deep and profoundly moving testimony of a life lived and an authentic experience. Was it not the witness of the mystics that led Bergson, in his latter years, towards the Faith?

In our weary world, strife is more and more a matter of spiritual forces. Ideological blocs find themselves less and less in opposition to pure reason as to a *mystique* or a conception of life which springs from the very depth of the souls and claims an influence on all its being. Christianity might show itself to be weak if its apostles and followers were merely people with intellectual convictions and a *technique* of action. The apostles who achieved the great advance for Christianity were those whose witness was of a superabounding life, men whose knowledge of God was interfused with love. Such was St. John, St. Paul, St. Augustine, such St. Ignatius, who wrote the Exercises and founded the Society of Jesus after passing through the spiritual experiences of Manresa.

The promise and strength of this special vocation is contained in the prayer of Our Lord after the Last Supper.

> I pray not that thou shouldst take them out of the world
> but that thou shouldst keep them from evil . . .
> As thou hast sent me into the world
> I also have sent them into the world.

It can truly be said that the great challenge of our times is a challenge uttered in terms of *living*.

The Communists have a new formula of life, and we know what they are supposed to sacrifice, and what they are prepared to sacrifice in order to force it on the world.

* Paper read by Reverend Father V. Paul Brassell, S.J., D.D., D.C.L., of Heythrop College at the meeting of the *Canon Law Society* in England, held in London, January, 1958.

The founders of Secular Institutees, believing in the immortal inspiration of the Church and in the perennial life of her sacraments have dared to restate the Christian message in a formula completely adapted to the days in which we live.

Those who study the constitutions and organizations of these Institutes are often taken aback by the demands they make upon human nature:

> the call to prayer amidst the noise and activity of the world;
> the call to obedience in circumstances in which divided loyalties could easily be fostered;
> to perseverance where it would be utterly natural to give up;
> to separation where solitude is so hard to achieve.

These demands are made with the utter realization that for the Christian the present age is an age of heroism.

These demands are made with a new hope of efficacy of a genuine contact between a truly Christian soul and the man in the street, with the realization of the great solidarity of all men in the mystical Body of Christ. As one writer has said, " This is humanism, but a humanism which is crucified ".

We may be tempted to think that this affair of Secular Institutes is a small affair, and not worthy of much consideration; we may even be tempted to think that such Institutes are composed of cranks or of pious women with nothing better to do, a gaggle of *Beatae.*

Yet in Spain and Italy there are Secular Institutes already approved by the Holy See with two or three thousand members. In France alone there are over 500 lay communities, some already approved as lay institutes, others awaiting approval, others wondering which way to proceed.

There are Secular Institutes in many countries which comprise three groups, namely of laymen, women and priests. The *Opus Dei*, one such, has now over 200 houses in 30 different countries. They exist in England and Ireland.

Secular Institutes exist in France, Belgium, Spain, Portugal, Austria, Germany, Holland, North and South America, England, Scotland and Ireland.

Here in England we have the Benedictine Oblates at Loughton, Essex, the Carmelite Institute at Aylesford, Allington Castle, Kent. The *Caritas Christi* union exists among us. The Teresian Insti-

tute, the Grail is doing splendid work, and the International Catholic Auxiliaries are working in London.

These Institutes are composed of men and women, leading dedicated lives in the world; who are desperately keen to bring the love of Christ and of souls into their daily circumstances.

These men and women are of all professions, trades, and from every social class, ardently desiring to be of great service to the Bishop, the parish priest, capable of doing a work and exercising an apostolate well nigh closed in these days to the cleric and the religious.

It is necessary for us to know something about them, their origin, their development, their ideals, their work, so that, should the occasion arise, we shall not hesitate to make use of them, that we may be able to guide chosen souls into their ranks, and to guide them should we exercise the office of chaplain in their regard.

This movement is in reality a ferment in the Church, and the present Holy Father does all he can to foster and guide them, since they correspond so well with his own evangelical spirit.

Historical Development of States of Perfection

The Church's law of life is that she should grow without ever altering in her essence or nature. She is ever growing and never dying.

Now, religious life, a life lived by those who wish to observe Our Lord's counsels and not merely his commands, who wish to be as like him as possible, is subject to this vital process of development. For centuries religious have taken vows and a religious habit, and have so differentiated themselves from people living in the world. They differed in domicile, dress, rule and general mode of life. This ideal of the religious life has followed a historical line of development.

Even in apostolic times we get the first beginnings of an order of widows and of virgins. St. Paul certainly regarded widows carefully selected as playing a definite part in the charitable work of the Church. We very early find epitaphs of girls who were designated as virgins at the age of nine or ten, implying that they were dedicated to virginity. Such maidens led a secluded life at home and devoted themselves to prayer.

Men "enamoured of eternity" very soon withdrew themselves from the atrocious circumstances of the decadent world around

them and became hermits. Thus St. Paul and St. Anthony who acted as spiritual father to many thousands of people.

Organization was soon necessary and soon undertaken, by St. Pachomius, for example, in Egypt; St. Hilarion, in Palestine; Mar Agquin, in Mesopotamia and Syria. Monks on the whole replaced hermits; the orderly life in community, the individual exercise of ascetism.

St. Basil in the East and St. Benedict in the West are (with others like Paulinus and Columban) immortal names connected with the establishment of monachism which, it may be said, saved at any rate the West from corruption.

But the day came when St. Francis and St. Dominic and with them all the active Orders, like those who went to rescue Christian slaves, sent men out of the cloisters, bade them move about, and yet asked them that they should be known as true religious. Opposition was fierce. These men were looked upon as mere gadabouts.

Then came St. Ignatius of Loyola, who told his men to wear ordinary priestly dress, proper to each country—secular dress, in fact, where there was no longer any religious costume. He emancipated them from long hours in choir. And again the outcry was loud. Such men surely should not be called religious at all; such an Order ought to be suppressed, especially as he had introduced an entirely new idea of simple vows to be taken by the professed, an idea unheard of in the Church. There were those who doubted whether these simple vows were sufficient to constitute a man a religious. The point at issue was settled by Gregory XIII in the two Constitutions "*Quanto fructuosius*" of the 1st of February, 1583, and the "*Ascendente Domino*" of the 28th of May, 1584, by declaring that these members of the Society of Jesus with simple vows were really and truly religious, not merely from any privilege accorded to the Society, but from the very nature of the case. Jesuits, like the Friars before them, became, so to say, normal ingredients in the religious life of Catholic men. It became normal in subsequent foundations, such as the Passionists and the Redemptorists, to prescribe simple vows for all members.

Since then there has not been much development in the religious life of Catholic men; for we can hardly count the arrival of the Brothers, Christian, Alexian, Xaverian, as a development. For what specified them was precisely that they are not priests; and on

the whole, Trappists, for example, had not normally been priests, neither had the Brothers of St. John of God.

With regard to women, we must recall that while St. Francis cloistered his Poor Clares relentlessly, Mary Ward, and St. Francis de Sales wished to uncloister the members of the religious orders founded by them. Mary Ward (1585-1645), a Yorkshire woman, founded her congregation for the education of girls, which was originally meant to pursue its work without the safeguards (which can also be impediments) of enclosure and religious habit.

St. Francis de Sales wanted to uncloister his Visitandines, that they might visit. But apparently the time was not yet ripe for such developments. Mary Ward suffered the fate of the far-sighted pioneer, and her congregation, after affording the material of endless discussions amongst canonists, was suppressed in its original form during her own lifetime. The Visitandines cannot visit, and they live behind grilles to the present day.

St. Vincent de Paul, however, though he antedated St. Francis de Sales by a few years, did manage to do what was needed. He created a band of sisters to whom he said that they have:

> no monastery but the sick room;
> no cell but a hired lodging;
> no chapel save the parish church;
> no cloister but the street.

But not even St. Vincent in his posterity has fully realised his ideal. Though the Sisters of Charity are unbelievably emancipated compared with their predecessors; yet, in many ways they are enclosed in their regulations.

The French Revolution and more or less contemporary upheavals made it necessary for Nuns either to cease to be nuns at all, or to be so in conditions of unparalleled liberty. The " suggestion " had been made, and it was accepted. Thenceforward there were uneasy tentatives all making for development in religious life. Women, bound by vow, were to mingle in ordinary life undifferentiated by costume or by hair cut short or by being currently named " Sister ".

These tentatives, however, reverted. Founded by some priest, they usually went back into houses, shut themselves up, took habits, and that was that—they became very like other religious. This may have been due to a feminine love of meticulously regulated

custom, or to pressure of public demand, since poor people knew where they were with the white Cornette, with Nuns, but these women were indistinguishable from any other social workers.

But there was a great development in this matter of religious congregations. And in the year 1900 Leo XIII on the occasion of promulgating the Constitution "*Conditae a Christo*" found himself faced with this problem. At that time there were what seemed to be secular congregations, not regular with solemn vows, but nevertheless calling themselves religious congregations. Since they were not Regulars, the legislation for Regulars with exemption could not as a rule and without perceptible inconveniences be applied to them. And till the middle of the XIX century there was reluctance, for fear of confusion, to allow them the title of religious. And yet on account of their form of life, their vows of religion, simple and public, their purpose of tending to perfection, their internal government, and their relation to the apostolate and the active life, they were able in some manner to share in the law governing the Regulars. This law, however, required to be modified in their regard, and Leo XIII gave them, so to say, their charter in this Constitution "*Conditae a Christo*", which found its definitive form later in the Code of Canon Law.

Here it is necessary to mention that side by side with this twofold development of the religious state, that is, with its division into Orders and Congregations, there had come into being a number of Societies, which, while imitating the religious state in so far as they observed community life under the rule of a superior, lacked certain of the juridical elements essential to that state.

They originated in the Low Countries in the early Middle Ages, the first recorded examples being the Beguines (12th Century) and the Brothers of the Common Life founded by Gerard de Groot (14th Century).

Since the 17th century their number has greatly increased. So we get the Vincentians, the Daughters of Charity, the Oblates of St. Charles, the Oratorians, the Sulpicians, the Holy Ghost Congregation, the Eudists, the Josephites, the Pallotini, the White Fathers, and others.

They vary very much in their rules. The Vincentians take the three essential vows and add a fourth vow of stability. The Beguines take a temporary vow of chastity. The Oratorians take no

vows at all. The White Fathers take an oath of obedience. The Pallotini make a promise of stability, common life, and of poverty, chastity, and obedience.

These societies are not religious, for their vows are not public. They find their own particular law in the Code, in a special appendix to the law *De Religiosis*, in the second Book under the title 17, *De societatibus sive virorum sive mulierum in communi viventium sine votis.*

During the early part of the XIX century, it became more and more evident that there were certain types of apostolate which could not be carried on easily by religious because of their distinctive garb and cloistered life. Many generous souls wished to follow Our Lord in the way of perfection, wished to exercise a special apostolate which they realized they must follow and exercise while still in the world.

For this reason The Daughters of the Heart of Mary, an institute without common life and a distinctive habit, was founded in Paris about 1790; it received definitive approval in 1857. A similar organization of men was established in Marseilles on June 24, 1821 by Father Joseph Allemand. Some of its members lived in their own homes and were drawn from various walks of life. Other groups of a like character existed as, for instance, The Virgins of Jesus and Mary, founded in 1844, The Daughters of Mount Calvary, 1866, The Sister Servants of Jesus in the Most Holy Sacrament of the Eucharist, 1867.

In brief so many such foundations came to life that the Sacred Congregation of Bishops and Regulars on August 11, 1889 issued a decree "*Ecclesia Catholica*" in which it said that more and more pious societies of the faithful have been formed which seek both to follow the counsels and to fulfil with greater liberty duties of charity from which the religious communities, owing to the perversity of the times, are mainly or entirely barred. The decree was careful to point out that though the Holy See gave its approval and encouragement to these societies because of their latent possibilities and potentialities for good, because they might be used as a vehicle of perfection in every walk of life, and were an extraordinarily useful means of spreading the apostolate in spheres of life impenetrable to the cleric and religious, and of reviving the Christian spirit in the homes, trades and professions and in social life generally, yet

they were not approved as religious congregations in any juridical sense, because apart from other requisites that were lacking, their vows were not public. They were approved as pious societies in so far as they placed themselves unreservedly under the jurisdiction of the local Ordinaries.

But these institutes and congregations or pious societies continued to increase and multiply in many and varied forms, some being linked to existing religious orders, and others developing along lines of their own.

During the first decade and a half of this present century, while the work of the compilation of the Code of Canon Law was being carried out, consideration was given to this new type of Institute whose members live in the world. This we know from the Ordinaries' remarks on the 1912 schema or tentative draft of the Code. But they did not include this decree "*Ecclesia Catholica*" in the Code or enact any fresh legislation in their regard. The time was not yet ripe. The Code therefore had no legislation for them. They came under the heading of "Associations of the Faithful in General".

These Institutes were numerous when the Code was published. In 1921 at a conference held at St. Gall in Switzerland, members of 25 such foundations, more or less approved by the Holy See, were counted. These associations kept on multiplying, and they numbered clerics and lay persons, men and women, among their members.

The problem became more and more urgent and a deeper study was made of these Institutes. During the International Congress of Canon and Civil Law held in Rome in 1934, Cardinal La Pluma, then secretary of the Sacred Congregation of Religious, indicated a change of policy. He expressed himself as very much in favour of these new foundations with their fresh enthusiasm and zeal. Father Goyeneche, C.M.F., made a fervent plea for the development and recognition of this new type of Institute. Hitherto, as lay associations, they had come under the jurisdiction of the Sacred Congregation of the Council. The Sacred Congregation of Religious would not touch them. Then finally a special commission was set up to study the whole question. A detailed examination of the whole question was being made by Father Arcadius Larraona C.M.F., now secretary of the S. Congregation of Religious. Favourable progress was reported.

It was felt that something more closely adapted to their needs was called for, especially as their flexible manner of life, without the safeguard of a religious habit, without a common dwelling, possibly even without the vigilance of the local Ordinary who might be unaware of their existence, was not without its dangers and difficulties. Some Constitution was required for these Institutes which would do for them what the Constitution "*Conditae a Christo*" had done for religious congregations, and the Code for Societies living in Common without Vows.

The first great difficulty was how to reconcile the idea of a state of perfection based on public vows and common life with this new form in which there were no public vows and no common life. Up to this time there had been four essential elements of religious life recognized in the Church: Observance of the Counsels, Public vows, common life, and legitimate ecclesiastical approval.

But this new form of religious life was found to be based upon various elements of Christian and religious asceticism, such as, the internal constitution, the hierarhical government, the suspension of all obligations of a similar nature, the profession and practice of the evangelical counsels, the special manner of exercising the ecclesiastical ministry and the apostolate, and the subjection to the local Ordinaries and so on.

So out of all these deliberations there emerged the Constitution "*Provida Mater Ecclesia*" of Pope Pius XII published on February 2, 1947 which distinguished Secular Institutes from both religious institutes and societies of the common life, in which public vows are not taken. Hence it can be taken as a second edition to Book II, part II, of the Code.

Therefore the Secular Institutes are now recognized as one of the canonical or juridical states of perfection, because they intend to attain charity by the practice of the evangelical counsels in addition to the precepts of the Christian life.

Nature of the Secular Institute

In respect to their end, as such, between counsels and precepts there is a difference of degree only, not of essence. For the end and aim of all Christians is perfection, which consists in the love of God and of our neighbour, which love brings us to our eternal goal. However, aside from the love attained by the Blessed in heaven,

there are diverse degrees of charity which we as earthly pilgrims may arrive at; one is necessary for salvation and, as such, is a matter of strict precept, whereas the other is merely a matter of counsel for those who desire to approach the ideal of perfection possessed by the Blessed.

The Christian ideal of the religious life is frankly an ascetic one, and religious life itself is simply the endeavour to effect a realization of that ideal, and the organization in accordance with it. And there are, of course, different degrees in this endeavour.

So the stability of the Secular Institute is in the vows or oaths or promises or consecration. For the common life is substituted " inscription " or profession which binds the subject to the Institute and the Institute to the subject in a permanent manner.

The very name points out that the members are striving to attain perfection while in the world and occupied with worldly affairs. They constitute a third form of religious perfection and pertain to the religious life.

One can see therefore why clerics can belong to such Institutes. The cleric as such is not constrained to the counsels of poverty, chastity and obedience by divine law, though he may make these engagements privately. The fact that the Latin clergy are bound to remain celibate makes no difference to this distinction between the clerical and religious states. And there is no contradiction in the fact that the Pope has declared that he has established a type of life in the Secular Institutes which ought to be regarded as a state of evangelical perfection, publicly recognized, because the members are obliged in a certain way to the practice of the evangelical counsels. There is in fact no objection to clerics joining themselves together in Secular Institutes in order, by the choice of this type of life, to tend to evangelical perfection. They are then in this state of tending to perfection not in virtue of being clerics, but in virtue of being members of a Secular Institute.

Therefore the members of the Secular Institutes do not take public vows and have no common life, although they may and shall have houses, convents and monasteries as centres of government, and as training houses for novices, and as asylums for their sick members.

They are ruled by the *Lex Peculiaris* of the Constitution " *Provida* ", to which are to be added the special regulations which can

be issued by the Sacred Congregation of Religious, such as the Motu Proprio "*Primo feliciter*" of March 12, 1948, and the Instruction "*Cum sanctissimus*" of March 19, 1948, as well as by the constitutions proper to each of them, which will naturally be tinged by the spirit of the different regions in which they are founded and are working.

Their constitutions must not contradict any regulations of the *Lex Peculiaris* or of the Code, and they must have, besides, the juridical approbation of the Holy See.

Secular Institutes are a new juridical institution, recently recognized officially as a component of the juridical state of perfection to be acquired in the Church. They are a new juridical state of perfection.

Their members bind themselves in a stable manner to the practice of the three evangelical counsels of poverty, chastity and obedience.

They differ from religious institutes because these take public vows. Secular Institutes not so, but private, or oaths or promises or special consecrations. They differ from societies of the common life, because they do not live in common.

So a Secular Institute is the juridical state of perfection in which the members for the purpose of acquiring Christian perfection and of exercising the apostolate, bind themselves to the practice of the evangelical counsels in the world, by a vow, oath, promise, or special consecration, according to the provisions of their proper constitutions and under the direction of common superiors, but often for the most part without living a common life.

Principles of the Secular Institute

The main requirements are:

(1) Profession or full consecration to a life of perfection;
(2) Membership in the Institute with its concomitant bond;
(3) Common house or houses.

By profession a stable and complete bond exists between the Institute and any member thereof. One element of the vocation to such an institute is stability. Common houses are needed for the training of new members and for looking after sick and aged members. It is obvious that some sort of headquarters are necessary.

By what laws are Secular Institutes governed?

(1) The provisions of "*Provida Mater Ecclesia*";
(2) Further provisions of that Apostolic Constitution made by the S. C. of Religious;
(3) The individual constitutions;
(4) The common law of the Code in matters pertaining to them or to their members, and which are not provided for by their own special or proper law.

They do not share in the privileges of clerics, nor do they have the same obligations as religious or clerics.

A Secular Institute can be suppressed by the Holy See alone.

Three documents are of paramount importance in this matter of Secular Institutes:

(1) The Apostolic Constitution of Pius XII "*Provida Mater Ecclesia*" of February 2, 1947;
(2) The Motu Proprio "*Primo Feliciter*" of March 12, 1948;
(3) The Instruction "*Cum Sanctissimus*" of March 19, 1948. (Cf. Bouscaren (1948) pp. 63-86.)

The Name: Secular Institute

Religious sodalities? Religious unions? Societies without vows and without common life? But *Secular Institutes* was chosen as being more apposite a name. The apostolate of Secular Institutes is to be practised not only in the world but as of the world, and therefore with avowed aims, practices and forms, and in places and circumstances corresponding to this secular condition.

The Procedure for Establishing a Secular Institute

For such an Institute to be established, it is not necessary that it already have a common house.

A group of the faithful (lay or clerics) function for some time as a loosely knit organization with a common purpose, apostolic, charitable or pious. Gradually the organization developes into some sort of canonical pious association of the faithful, such as a pious union, confraternity, sodality.

During this time vigilant care must be exercised to see that nothing is permitted to these associations, either internally or externally, which is beyond their present condition and seems to belong specifically to the secular institutes.

Those things should be specially avoided which, in case the permission to establish the association as a Secular Institute is later refused, could not easily be taken away or undone, and would seem to exert a sort of pressure on superiors to make them grant approval outright or too easily. (Instruction of the S. C. Relig. March 19, 1948, n. 6)

After the association has proved itself self-sustaining and capable of carrying out its purposes and of living up to the requirements of a Secular Institute, application should be made to Rome for permission to be established juridically as a Secular Institute. When any such an association has all the requirements for a Secular Institute, it must apply to Rome for approval as such.

The local Ordinary applies to Rome for approval: not a mere titular Bishop or a Vicar Capitular or a Vicar General. And the application must be sent to the S. C. of Religious.

After the Sacred Congregation has given its *nihil obstat*, the local Ordinary may proceed to establish the Secular Institute as an ecclesiastical moral person. Official notice of such establishment is sent to the S. C. of Religious. It thus becomes a diocesan Secular Institute.

When a decree of praise is issued by the Holy See, then the Institute becomes an institute of pontifical right.

Present Condition of These Institutes

Up to March 1950 the number of applications received in Rome both for permission to establish diocesan Secular Institutes as well as for the decree of praise for an institute already established totalled 98.

Three fourths of the applications came from institutes of women.

Of the institutes of men, two fifths were clerical.

Diocesan Secular Institutes already established numbered 22.

THE ACCEPTANCE OF THE RESCRIPT OF SECULARIZATION

A rescript of grace is generally a messenger of favors. In one case, however, the favor granted implies the privation of so many rights and spiritual benefits that it often produces uncertainty and hesitancy in the expectant beneficiary. A rescript of secularization not infrequently stirs up in the petitioner emotions that put holy fear in his heart. The rescript was eagerly, perhaps stubbornly, sought; now that it has been granted and executed, and the favor is within one's reach, it does not seem to be so desirable. Then a religious might seek to delay its acceptance and possibly thinks of letting the whole thing fall through. God's call and God's love, now more than ever before, seem to go together. The theological meaning of one's religious vocation is at times best revealed through the juridical formalities that bring into bold relief the Church's concern for one seeking secularization.

A rescript of secularization has no juridical value and produces no canonical effects until it is accepted by the beneficiary. Until the religious, by a positive act which must follow the granting and the execution of the rescript, accepts the grace, it has no value whatsoever. The assent given when the rescript was requested is not enough.[1]

The vexed question of the need of acceptance of a rescript for its validity, so widely disputed before the promulgation of the Code of Canon Law,[2] has not been completely settled by the norms of the Code. But this much is commonly accepted as a general principle, that "the use of a rescript depends on the will of the beneficiary, while its validity is exclusively dependent on the power and will of the authority granting the rescript."[3] The granting of a rescript is not an act of donation, but an act of jurisdiction whose *validity* arises from the power and will of the superior, independently of the

[1] Cf. *Response of the Sacred Congregation of Religious,* August 1, 1922, in *AAS,* 14 (1922), 501; Voltas, *CpR.,* 2 (1921), 371; Maroto, *CpR.,* 4 (1923), 65 & 99; Schaefer, *De Religiosis,* (Rome, 1940), p. 972; Gutiérrez, *CpR.,* 32 (1953), 186-197.

[2] Cf. Michiels, *Normae Generales Iuris Canonici,* (Desclée, 1949), II, 321.

[3] Ojetti, *Normae Generales,* (Rome, 1927), p. 213.

will of him to whom the rescript is given.[4] Yet, a valid rescript is not necessarily efficacious. On this point there are many opinions.[5] This diversity of opinion does not touch or exclude the possibility of a rescript being efficacious and operative prior to the act of acceptance, and even without knowledge, on the part of the beneficiary.[6] The removal of a bond or obligation, which by common law binds the beneficiary, can be done without his cooperation by the competent superior. Hence, the entire problem resolves around this point: whether the superior granting the rescript *wishes* it to be operative as soon as it is issued or executed, or only after the beneficiary has received notice and has accepted the rescript.

Rescripts are not operative independently of the beneficiary whenever his act of acceptance, or knowledge, is expressly required as a previous condition. This condition may be imposed in a special clause by the superior when granting the rescript, or by a law to which the superior issuing the rescript is subject.[7] Bender claims, even against the express declaration of canons 37-38, that natural law requires the knowledge of, or notice to, the beneficiary for a rescript to be effective.[8] He assumes that these canons only apparently dispense with the knowledge of the beneficiary, at least in some cases.[9] There is no difficulty in accepting his opinion, if limited to some certain cases. The general norm of the canons, however, stands. Maroto expressed that opinion in 1922.[10]

Some canonists claim that the Code of Canon Law changed the pre-Code common teaching regarding the need of acceptance and knowledge of a rescript. Van Hove says that the Code departed

[4] Michiels, *op. cit.*, p. 331; Wernz-Vidal, *Jus Canonicum*, (Rome, 1938), I, n. 265; Van Hove, *De Rescriptis*, (Dessain, 1930), n. 119.

[5] Cf. Michiels, *l. c.*

[6] Suárez, *De Legibus*, (Paris, 1856), l. VIII, c. 25, nn. 11-14. Cf. Bender, *Potestas Ordinaria et Delegata*, (Desclée, 1957), p. 195, where he affirms that canon 37 applies to the delegation to perform a marriage only when given by a superior, for in that case there is no need of acceptance of the delegation, which is required in other cases.

[7] Michiels, *op. c.*, p. 332.

[8] *Op. cit.*, p. 195.

[9] *Op. cit.*, p. 197.

[10] *CpR.*, 4 (1923), 102.

from the more common doctrine.[11] Michiels seems to hold the same opinion when he quotes the 1912 draft of canon 40 of the first book of the Code. That draft, according to Michiels, retained explicitly the common doctrine: "A rescript may be obtained from the Holy See for another person even without his consent; but, in that case, the rescript does not become fully effective until he accepts it, unless the nature of the thing, or the will of the superior, demands it."

As a matter of fact, the pre-Code common teaching was not changed.[12] It is substantially retained in canon 38: " Rescripts, by which a favor is granted without the requisite ministry of an executor, take effect from the moment at which the letters were issued; all others, from the time of the date of execution." This is the general rule; but, there are exceptions.

On August 1, 1922, the Sacred Congregation of Religious proposed and answered the following doubt: " whether a religious, who has obtained an indult of secularization or simple dispensation of his vows, may reject either document when he receives notice of the grant from the local superior, although the Superior General has already executed the rescript, according to the norms of canon 56 of the Code of Canon Law." The answer was: " in the affirmative, provided the superiors have no serious reasons for the contrary, for, in such case, they must have recourse to the Sacred Congregation." [13]

This answer of the Sacred Congregation of Religious is not an authentic interpretation of canon 37, for only the Pontifical Commission for the Authentic Interpretation of the Canons of the Code can give authentic interpretations.[14] Neither does this response settle the other problem of the need of acceptance for all other rescripts. Here the Sacred Congregation of Religious makes a norm, within its competence, and in conformity with the prescriptions of canon 37: ". . . the rescript is nevertheless valid before it is accepted, unless otherwise provided in the appended clauses." This

[11] *Op. cit.*, n. 118.

[12] Bender, *op. cit.*, p. 196; Maroto, *CpR.*, 4 (1923), 71; Gutierrez, *CpR.*, 32 (1953), 186.

[13] *AAS*, 14 (1922), 501.

[14] Cf. Regatillo, *Nulidad del Matrimonio por Defecto de Forma* in *Las Causas Matrimoniales*, (Salamanca, 1953), p. 410.

solution of the problem is a *de facto* solution which does not eliminate the question proposed by Bender: Is it possible to find the very nature of these cases where acceptance is required, not by "appended clauses", but by the substance of the favor granted in the rescript?

Although this question cannot be fully discussed here, for that is not the purpose of this writing, it has significant bearing on the matter of the rescript of secularization.

A rescript of secularization or of dispensation of the religious vows is ineffective unless the beneficiary gives his consent; the reason is because this mode of departure from the religious life is a *voluntary* departure which necessarily implies the consent of the religious.[15] This is something very different from dismissal. The indult proceeds, not as a command or an imposition, but as a permission or favor. Now favors and graces are given not to the unwilling, but to those who willingly ask or receive them.[16] This is especially true of the rescript of secularization. Entrance into the Novitiate and religious profession must be entirely free from violence, grave fear and fraud.[17] Departure is an act of a similar nature and of greater importance. Secularization through force or fear should be at least voidable.[18]

Absolutely speaking, there seems to be no reason to doubt the Church's power to break the bond of the religious profession without the consent of the religious. That is the case when a religious in temporary vows is dismissed by his Superiors, according to canon 648: "A religious dismissed in this manner is automatically freed from his vows." Yet, a rescript of secularization obtained for a religious without his knowledge and consent, if it were valid, would constitute, not a voluntary departure, but a dismissal. All one can conclude from these premises is that, at some time or another, the consent of the religious is required. Perhaps this is sufficient to prove that the prescriptions of canon 37: "A (valid) rescript may be obtained for another person even without his consent . . .", are not a general rule without exceptions.

[15] Maroto, *loc. cit.;* Schaefer, *op. cit.*, p. 972.

[16] D'Annibale, *Summula Theologiae Moralis* (Rome, 1905), I, 223.

[17] Can. 542, 1; can. 572, § 1, 4°.

[18] Can. 103, § 2; Goyeneche, *Quaestiones Canonicae de Jure Religiosorum*, (Naples, 1955), II, 133.

According to the common law (canons 37-38), only when a religious asks for a rescript of secularization would the indult be valid of itself, provided the consent existed at the time of the execution for a rescript in commissory form, or at the time of the granting of the rescript, without subsequent acceptance, for other rescripts.[19] If secularization is considered as a grace or favor, in the light of the prescriptions of canon 37, one could obtain a rescript of secularization for a third party, even against his will. Then the recipient, according to Gutierrez, could abstain from using the rescript (". . . this person is free to use or not use the favor . . ."—canon 37), although the rescript would be valid before his acceptance, unless the appended clauses stated otherwise.[20] Here, there is a conflict of implied ideas, apparently irreconcilable. If the rescript is valid and cuts off the bond that unites a religious to his institute, it does not seem possible for him to refuse to use the rescript; he is not a religious any longer. Is it possible to really distinguish between validity and efficacy of the rescript in the type of case considered here?

Canon 69, which substantially contains the *Regula Juris* 61 (*Quod ob gratiam alicuius conceditur, non est in eius dispendium retorquendum.* R. J. in VI), states that "no one need make use of a privilege given him for his benefit alone." Therefore, it seems that one could logically conclude that the recipient of an already effective rescript of secularization is free not to use it. This argument, according to Maroto [21] is a very good justification of the response of the Sacred Congregation of Religious given on August 1, 1922, which allows the beneficiary to reject the rescript; but it does not prove that, according to the general principles of law stated in the canons, he had a right to do so. This is not a question touching the *use* of a grace or favor in order to obtain a further effect, as would be the case when a faculty is given the subject to qualify him to perform a certain act. A rescript of secularization is a favor granted, something done; all that is left to consider is the time when it happens to be granted or done: when does secularization happen?

In a way, it appears that even in this matter one can visualize the petitioner receiving a faculty to act or do something whereby he becomes a secular. His acceptance, perhaps, is the act, the doing

[19] Maroto, *CpR.*, 4 (1923), 102; Gutierrez, *CpR.*, 32 (1953), 186.

[20] *CpR.*, 32 (1953), 187.

[21] *CpR.*, 4 (1923), 103.

something which produces secularization. Maroto [22] does not believe that such interpretation would be juridically sound. Here, he says, it is a question of solving the bond which binds the religious or of removing the burden of the obligations to which he is subject. This is a question of time and not of powers. Once the religious is secularized, he is free to do what *before* he could not do. The law says no more about the use he will make of his freedom. Canon 69 and the *Regula Juris* 61 refer to remote effects, but do not touch the immediate effect which consists in the acquisition of the favor; and this happens according to the norms given in canon 38.[23] This conclusion does not prejudice the distinction discussed by some canonists regarding the validity and efficacy of rescripts.[24]

The new acceptance by the beneficiary, required by the Sacred Congregation of Religious since August 1, 1922, is a condition added to the requirements established by common law for the effectiveness of rescripts. This rule is entirely safe and eliminates doubts as to the time when the religious is made free from his profession, if consideration is had of the time of granting or executing the rescript, a point much debated by canonists.[25] The norm is extremely favorable to the religious himself and a kind of protection against possible haste on the part of the superiors to get rid of an individual who formally has shown a desire to leave the religious family. The Church will have this religious rather remain in his holy vocation; for that end, she gives him the full right not to accept the granted and executed rescript of secularization. It can happen, however, that the superiors have serious reasons not to let the rescript remain inoperative, but to let it produce the intended effect of separation of the religious from his institute. In such a case, the religious has no right to refuse to accept the rescript, for the response of the Sacred Congregation makes his refusal subject to an essential condition, "provided (*dummodo*—cf. canon 39) the superiors have no serious reasons for the contrary." [26] But neither does, then, the rescript become effective by severing the religious from his institute. De

[22] *Loc. cit.*

[23] Maroto, *Cpr.*, 4 (1923), 104.

[24] Cf. Michiels, *op. cit.*, p. 325; Rodrigo, *Praelectiones Theologico-Morales Comillenses*, Tomus II, *Tractatus de Legibus*, (Santander, 1944), n. 762.

[25] Cf. Maroto, *loc. cit.*

[26] S. C. of Religious, August 1, 1922. *AAS*, 14 (1922), 501.

Carlo states that superiors can intervene and send their recourse to the Sacred Congregation when the rescript has become, in fact, only a disguised dismissal.[27] This does not seem to conform to the purpose of the recourse, which is precisely to seek a kind of dismissal for the religious who wishes now to stay in the institute.

The only course open to the superiors is recourse (*in suspensivo*) to the Sacred Congregation, who will decide what is to be done.[28] When a rescript of secularization, no matter from what source it originated, is refused, only the Holy See is competent to receive a recourse from the superiors. For members of diocesan institutes, the local Ordinary can grant an indult of secularization (can. 638); but only the Holy See is competent to receive the recourse of the objecting superiors.[29] If the reasons of the superiors are considered sufficiently grave by the Sacred Congregation, the religious will be forced to leave through a kind of dismissal, with the effects of secularization, as it happens in the dismissal of religious in temporary vows.[30]

Maroto finds a canonical basis for the response of the Sacred Congregation of Religious, which adds a condition for the effectiveness of the rescript, in canon 640: " He who leaves the institute with an indult of secularization . . ." Two conditions seem to accompany secularization: A rescript and the actual departure from the institute. Therefore, besides the indult, an act of the religious is required by canon 640. This act, Maroto explains,[31] is not the material act of exit from the religious house, but the formal act of separation from the institute, which is precisely the acceptance of the rescript required by the Sacred Congregation.[32]

This explanation does not necessarily mean that canon 640 requires the two things for secularization.[33] But, in order to remove

[27] *Jus Religiosorum,* (Desclée, 1950), p. 471.

[28] Abbo-Hannan, *The Sacred Canons,* (Herder, 1952), I, 657, note 10.

[29] Tabera, *Derecho de los Religiosos,* (Madrid, 1952), p. 527.

[30] Cf. can. 648.

[31] *CpR.,* 4 (1923), p. 105.

[32] Cf. Gutierrez, *CpR.,* 32 (1953), p. 188.

[33] Maroto, *loc. cit.;* Michiels, *op. cit.,* p. 332, note 2, against Van Hove.

all doubts, the Sacred Congregation declared, in 1922, that such should be, in practice, the interpretation of the canon. The forms used by the Sacred Congregation of Religious for the rescript of secularization since 1922 include a clause that requires acceptance on the part of the religious.[34]

The clause requiring a new acceptance can produce some juridical effects even prior to the execution of the rescript. Although, of strict law nothing forbids that rescripts of secularization be granted without executor,[35] in practice it is always granted in commissory form.[36] If the petitioner declares to have changed his mind before the rescript is executed, the executor cannot validly execute it. Gutierrez gives a good reason for this statement: The Sacred Congregation does not wish to secularize the unwilling.[37]

The response of the Sacred Congregation of Religious, given in 1922, requiring the acceptance of the rescript by the beneficiary, was then considered sufficient to obviate many difficulties and to eliminate many doubts. But this norm, so favorable to the religious, later on became too burdensome to the institutes, because the time within which the acceptance or rejection of the rescript should be made had not been determined. And so, it often happened that the petitioner held up indefinitely the rescript and reserved to himself the right to decide when he would dispose of the matter. The inconveniences for community life following from this way of acting, which was within the law, became obvious, especially in the last few years, to such a degree that it made it necessary to establish a norm specifying the reasonable time within which the right of refusal could be exercised.[38] In September or October of 1951, the Sacred Congregation of Religious began to add to every rescript of secularization the following clause: " This rescript must be accepted or refused within ten days from the communication of the execution. If the petitioner does not expressly refuse the requested dispensation within ten days from the communication of the execution, he is presumed to have accepted the rescript." [39] One can surmise that

[34] Gutierrez, *CpR.*, 32 (1953), 189.

[35] Gutierrez, *CpR.*, 32 (1953), 193, note 9.

[36] Escudero, *Institutos Seculares*, (Madrid, 1954), p. 268.

[37] *Loc cit.*, p. 188, note 4; cf. Schaefer, *op. cit.*, p. 973.

[38] Cf. Gutierrez, *l. c.*, p. 188.

[39] *CpR.*, 32 (1953), 189.

this clause represented a strong reaction on the part of the Sacred Congregation against the many abuses brought about by the lack of determination of the time when the rescript could be accepted or rejected, for it adopted a clause contrary to its general policy of favoring religious vocation. However, only a few months later, when new forms were printed, while the ten-day period of time was retained, the effect of not acting upon receipt of notice of the rescript was reversed. This new and current form restores the traditional attitude favorable to vocation: If he does not accept the rescript within ten days, he retains the religious status, and the rescript becomes void.

The portion pertaining to acceptance, in the current form of the rescript of secularization, reads as follows: "*Post decem dies a recepta communicatione Decreti exsecutorialis ex parte Oratricis, praesens Decretum, si non fuerit acceptatum, nullius roboris esto.*" (Ten days after the petitioner has received notice of the execution of this Decree, it becomes void if it has not been accepted.) [40] The style and practice of the Roman Curia in this matter is stated by Larraona, as follows: "The present practice of the Sacred Congregation demands, under pain of subsequent invalidity of the rescript, that all rescripts for dispensation from vows be definitely accepted or rejected within ten days of the date the subject is notified of the granting of the rescript." [41]

Two points have to be clarified in this statement. Larraona speaks of "dispensation from vows" and does not use the term "secularization," while the writer has been speaking practically only of secularization. The 1922 response of the Sacred Congregation speaks of both the indult of secularization and simple dispensation of vows. Formerly, the two were very different things. The indult of secularization contained only permission to stay in the world, and was used especially in the case of religious of solemn vows, who were still bound by the obligations arising from the vows, at least in the essentials. The dispensation of the vows, as is obvious, freed the religious from the obligation of the vows.[42]

[40] Form 62, used for the rescript of secularization of a religious of simple perpetual vows, Protocol Number 4053/58.

[41] *Acta et Documenta Congressus Internationalis Superiorissarum Generalium,* (Rome, 1952, ed. Paulinae), p. 278.

[42] Maroto, *CpR.*, 4 (1923), 66.

According to the present Code of Canon Law (canon 640), the indult of secularization separates the religious from the institute and dispenses him from the vows, so much so as to change him from a religious to a secular. Hence, there is no substantial difference between the two. The Code of Canon Law, speaking of voluntary departure from religion, does not mention the dispensation from the vows, as if to indicate that voluntary departure is generally controlled by an indult of secularization.

Up to 1922, the Sacred Congregation retained the practice of granting both the indult of secularization and the dispensation of vows, with only this difference, that the indult of secularization was given to religious in sacred orders, who returned to the world to be incardinated into a diocese, in keeping with the norms of canon 641, and the dispensation of vows was given to all other religious, men and women.[43] However, later on the Sacred Congregation reduced all forms of rescripts to indults of secularization. The various forms in use around 1923 may be found in *CpR.*, 4 (1923), pp. 67-69. The form presently used for religious of perpetual simple vows, other than priests, is an indult of secularization.[44] The clause regarding the ten-day period for acceptance is not included in the rescript of secularization of priests; as a matter of fact, they are first given only a decree of exclaustration *ad experimentum*, Form 66.

The second observation regarding Larraona's statement is that " the granting of the rescript " includes the execution whenever the rescript is given in commissory form, which is the common case.

There should be no great difficulty in counting the ten days the Sacred Congregation allows the petitioner for further consideration. As stated above, this type of rescript is generally granted in commissory form and, therefore, the time begins to run when the notice of execution is given to the petitioner. The execution is generally left to the will and conscience of the executor, without any particular time being set. Therefore, there seems to be no objection to the executor's informing the petitioner of the granting of the rescript by the Holy See before he executes the rescript. Such action would be in accord with the nature of the rescript, extremely favorable to the petitioner; it would allow him more time to reconsider his decision

[43] Maroto, *loc. cit.*

[44] Cf. Gutierrez, *CpR., loc. cit.*

to give up the religious life. Whatever time elapses between this notification and the execution and its subsequent notice is not counted in the ten-day period. Likewise, there seems to be no objection to the superior's not informing the petitioner immediately after the executed rescript has been received. He might wait until such time as it will be evident that the prudent thing to do is to proceed to secularization. An undue delay, however, would certainly be reprehensible and an injustice to the petitioner. But the delay, in no case, will affect the juridical requirements. The rule enunciated in canon 52, about the presentation of rescripts given in commissory form, could be applied here: "Rescripts . . . may be offered to the executor at any time, provided delay is owing neither to fraud nor to malice."

The very purpose for which a ten-day period is allowed makes it clear that it must be ten useful days, in the sense of canon 35. It means that the religious knew his right to refuse the rescript and to wait for ten days; that he had received notice of the rescript's having been executed; and finally, that he was able to act. It follows that, if, for instance, ten days pass without the petitioner's acting to accept the rescript only because he did not know there was a time limit, the ten days would not count, for, actually, he did not know his rights.[45]

This could explain the statement made by a canonist in a case when a Sister of simple perpetual vows had been notified of the arrival of an executed rescript of secularization. She took her time to think out her final decision. More than ten days went by, and then, she decided she did not want to use it. Her decision could not be different, because the rescript was not available any longer; it had become void. However, the canonist told her she could pick it up *whenever* she decided. This would be true only if she did not know there was a time limit. To make things clear, the petitioner should be informed about his rights when the notice of execution is given him. A similar case, but with a different ending, took place in 1954. The petitioner had been informed about the executed rescript, Protocol Number 7659/54, but she did not act within ten days. Later on, the religious wished to use the rescript to legitimately return to the world. The case was referred to Rome and the answer came back that: "as the ten days, assigned by the rescript for ac-

[45] Gutierrez, *CpR., loc. cit.*

ceptance or refusal, have elapsed, the rescript is no longer valid. Therefore, another application must be made by N.N. and presented with the approval of the Superior General."

Feast days are counted in the ten-day period, since no particular court or chancery office acts are required.

Although nothing is stated in the law as to the manner of giving notice, it seems necessary that the notice be *official*, given by one who can act by reason of his office or by special mandate. Rumors, or even news, relayed by reliable persons, but acting in a private capacity, are not sufficient notice.[46]

The juridical effect of a passive attitude on the part of the petitioner is now clear, according to the law: after ten days, to be counted after the religious was given notice of the execution of the rescript of secularization, the rescript becomes void. The writer does not believe that doubts or hesitancy on the part of the petitioner could prevent the rescript from becoming void after the ten-day period. That seems to destroy the meaning and the purpose of the clause added by the Sacred Congregation of Religious, in 1951, regarding the ten-day period. However, that seems to be the opinion of Goyeneche. He states that, if the beneficiary is doubting and hesitant, a thing that can be determined even from the surrounding circumstances, the rescript does not perish, but is suspended so that, even after several months, the rescript could produce the effect of secularization.[47] Two reasons seem to indicate that he is speaking of the present practice and current forms of the indult of secularization, which include the ten-day clause: First, the book where the statement appears was published in 1955, several years after the Sacred Congregation of Religious had started the new practice, which Larraona so clearly stated at the Congress of Reverend Mothers in Rome, 1951. Secondly, Goyeneche takes notice of the study on acceptance by Gutierrez, a study he calls " extensive and well documented."[48] As it appears from many quotations made in this writing, Gutierrez is particularly concerned with the ten-day clause. But, there are other reasons which seem to demand a different explanation of Goyeneche's position. For one thing, it is

[46] Gutierrez, *CpR.*, 32 (1953), 194.

[47] *Op. c.*, II, 127.

[48] *Op. c.*, p. 126, note 3

known [49] that the answer to the particular question which Goyeneche has under consideration was written in 1937, a number of years before the ten-day clause was in use.[50] It is possible that, in collecting the cases written throughout a thirty-year period, the original doctrine was left unchanged, although an occasional footnote was added regarding especially new documents or writings. An oversight could allow certain conflicting ideas to be retained, as seems to be the case here. The only three possible situations Goyeneche considers in his solution of the case are these: acceptance of the rescript, its formal and definitive renunciation, and finally indecision. Nothing is said about the juridical effect produced by the lapse of ten days.

A somewhat similar situation is found in the commentary by Regatillo [51] where he affirms that, if the rescript of secularization was given absolutely (which is no longer the case), the religious can make use of it any time. He speaks also of a rescript becoming void by prescription or tacit renunciation. This teaching is obsolete and not in keeping with the current law and practice.

The writer has pointed out these inaccuracies in the works of such prominent canonists only with the purpose of advising those who consult them that the positive law on this point has been changed.

Canonists have found many difficulties when considering the various possibilities regarding acceptance and rejection of the rescript of secularization, if the petitioner is not merely passive during the ten-day period.

It might be best to state from the start that a rescript of secularization can be used only once: a formal and definitive acceptance makes it void in the future for any other use, and the same is to be said of a formal definitive rejection. For further different action, another rescript would be required. There seems to be no particular reason for disagreeing on this. Another thing is to determine when the acceptance or the rejection, in the formal and definitive sense, has taken place.

Supposing the petitioner has informed the superiors of his abso-

[49] Cf. note before the *Imprimi possit* of his work.

[50] Cf. *CpR.*, 18 (1937), 240.

[51] *Institutiones Iuris Canonici*, Santander, (1951), I, 522.

lute and formal renunciation, the indult thereby became void, that is, the religious remains a religious and cannot use that rescript to legitimately return to the world if he happens to change his mind.[52] Juridically speaking, everything is complete, and it is not possible to undo what was done. A definitive act of rejection is not voidable. On this point there is no discordant voice among outstanding canonists. Among other reasons, the following corroborate their interpretation:

a) The mind of the Sacred Congregation in regard to this matter has always tended to discourage secularization and to favor the religious vocation. A rejection which could be voided would leave the door open to secularization after it had been closed by rejection of the rescript. That would be far from favorable to vocation.

b) Rejecting the executed rescript means a withdrawal of one's petition by changing one's intention. The Holy See regrets to have to grant secularization and does so only moved by the petition of the religious who can no longer bear the sweet yoke of Christ. If the petition is withdrawn, it is the mind of the Holy See that the rescript be made void.

c) The faculty granted to the petitioner to reject the rescript after it has been executed is an exception to the general norm stated in canon 38, that rescripts in commissory form are operative from the time of execution. Therefore, the faculty should be strictly interpreted, at least whenever the contrary interpretation would be opposed to the letter and general purpose of the law.

d) The text of the ten-day clause, in the rescript of secularization Form 62, mentions only the possibility of non-acceptance. Nothing is expressly said of a rejection before the ten days are up. To assure that a definitive act of rejection on the part of the petitioner is inoperative before the ten days have elapsed would be tantamount to depriving the religious of his faculty to act and to reject a rescript he wishes to decline. Such an interpretation would be against the mind of the legislator.

Canonists are divided on the case of a religious who requests and obtains an executed rescript of secularization and, furthermore, accepts it, but then changes his mind and wishes now to remain a

[52] Coronata, *Institutiones Iuris Canonici*, (1928), I, 832; Goyeneche, *op. c.*, II, 127; Tabera, *op. c.*, p. 527; Gutierrez, *CpR.*, 32 (1953), p. 194; Jone, *Commentarium in Codicem Iuris Canonici*, (1950), I, 563.

religious. According to Tabera [53] there is no room for a change of mind. Acceptance completes all that is required for the rescript to actually break the bond of the religious profession. Canonists, who disagree with this opinion, will have to admit that, once a religious ceases to be a religious because the bond of his profession has been broken by secularization, he has no right to enter religion without first obtaining a dispensation from the invalidating impediment listed in canon 542, 1°: " Persons who . . . have been bound by the bond of religious profession . . ."

To justify the opinion that maintains that a change of mind is juridically possible and effective after accepting the rescript, one must assume the acceptance was not definitive. Here, however, arises another problem which the defenders of that opinion will have to answer. If the type of acceptance they have in mind is not a formal and definitive acceptance, would it be sufficient to make the rescript operative when there is no change of mind? Were the " secularized " religious allowed to remain in the convent for, say, fifteen days on account of very serious personal reasons, when did the secularization take place?

Woywod-Smith state that " secularization does not take place until the religious, who asked for and obtained the rescript, accepts it and leaves the organization. Before he leaves, he still has a chance to decline the indult, even though the Superior General has already issued the decree of execution of the indult." [54] The meaning of the phrase " leaves the organization " is made clear in the next paragraph, with the evident implication that two conditions are required for secularization: acceptance of the executed rescript and exit from the religious house. They state: " With reference to the refusal to accept the secularization, the question arises whether, if the religious first accepts it, he may afterwards, before he has left the religious house, refuse to take the indult." Their answer to the question is that " nothing definite can be said on this question, but it seems that, according to the opening words of canon 640: ' when a professed religious, having obtained the indult of secularization, leaves the organization ', the final step which separates him from the organization consists, not merely in the acceptance of the in-

[53] *Op. cit.*, p. 527, note 35; Gutierrez, CpR., 32 (1953), 194.

[54] *A Practical Commentary on the Code of Canon Law*, (New York, 1957, combined Volumes I & II), I, 319.

dult, but in the acting on the indult, namely, his leaving the organization." [55] Here, they quote Maroto, *CpR.*, 4 (1923), 99-106.

If the only reason Woywod-Smith have, to maintain this opinion, is the authority of Maroto, it is possible that their opinion is not justified. Maroto does not state what Woywod-Smith seem to claim to be his opinion, stated somewhere between pages 99-106 in *CpR.*, 4 (1923). As quoted above, Maroto affirms that his explanation " does not necessarily mean that canon 640 requires the two things (indult of secularization and an act of the religious) for secularization." But, supposing that canon 640 would require an act of the religious, that is to be understood, he says, " not of the material act of departure from the religious house, but of the formal act of separation from the institute, which is *the acceptance of the rescript required by the Sacred Congregation.*" [56]

There is another authority, quoted by some canonists,[57] in favor of the juridical efficacy of a change of mind to prevent the breaking of the religious bond when a rescript had been accepted. Woywod-Smith state that " Vermeersch (*Periodica*, XI, 151) touches on this question, saying that the acceptance, once made, completes the legal act. He suggests, however, that it might be in harmony with the intention of the above declaration of the Sacred Congregation (August 1, 1922) if, by the mutual consent of both superiors and the subject, the act of acceptance be considered as not made." This opinion was only a suggestion stated in the form of a question. By starting the question in its Latin text with the particle *nonne*, he suggested that he expected an affirmative answer. But, he requires that the retraction of the acceptance be made immediately (*mox*); and he would feel more firm in his opinion if the transaction had not become known to others. From the above quotation, one thing is certain: " the acceptance completes the legal act." There is no need of any further act on the part of the religious. Now, taking into consideration the mind of the legislator and the purpose of the law, it seems reasonable to allow certain flexibility as to an acceptance so quickly retracted and unknown to others. The great gentleness and maternal concern of the Church for religious in trouble about their vocation would recommend this interpretation. Of

[55] *Loc. cit.*

[56] *Loc. cit.*, p. 105. Italics added.

[57] Woywod-Smith, *op. cit.*, I, 319.

strict law, however, the writer believes, the legal act of acceptance, once completed, produces all its effects and is not voidable.[58] Tabera states that the benign interpretation of Vermeersch is entirely inadmissible; his argument of analogy from the novitiate is no proof.[59] The rescript would perish at the time the legal act was completed. If the religious wishes to re-enter his institute, or another one, he would need a dispensation from the Holy See.[60] It does not seem right to construe the response of the Sacred Congregation as giving superiors the faculty to enter into an agreement with the subject to undo what was done by the subject's acceptance. The document only mentions the possibility of a subject's refusal to accept the rescript; then, superiors may have recourse to the Sacred Congregation for the purpose of demanding that the subject be excluded from the institute in the manner stated above, but not precisely in virtue of the rescript of secularization, which is good only for a voluntary departure.

Regatillo also affirms the efficacy of a change of mind after the acceptance of the rescript, on condition that the religious has not yet left the house.[61] When the petitioner, he says, has accepted the indult of secularization, but has not left the house yet, there is room for an efficacious change of mind, and the religious is not secularized. Regatillo defends his thesis on the theory that what canon 556, § 1 (he quotes § 2) states about the interruption of the novitiate by the dismissal of the competent superior applies to the renewal of temporary vows as provided in canon 637,[62] and furthermore, to the actual effect of secularization by rescript.[63]

A close look at these canons will show that there is no such analogy. Canon 556, § 1, states that one of the ways of interrupting the novitiate is by "dismissal of the novice by the superior and the novice leaving the house." Leaving aside all questions as to when a novice is said to leave the house, in the sense of this canon, the

[58] Voltas, *CpR.*, 2 (1921), 371.

[59] *Op. cit.*, p. 527, note 35.

[60] Cf. Gutierrez, *CpR.*, 32 (1953), 194.

[61] *Institutiones*, I, 522.

[62] *Op. cit.*, p. 519.

[63] *Op. cit.*, p. 522.

main point to be emphasized here is that leaving the house must be a true execution or carrying out of the dismissal.[64] A dismissal by the superior, according to the will of the legislator, is not enough to interrupt the novitiate.[65] A further condition is required, a definite leaving the house, which can be a material and formal or only a formal departure, according as the novice be in the house or outside and, in this last case, he is not permitted to return to the novitiate. Leaving the house has a very specific juridical meaning determined by the legislator in canon 556, § 1. It is an essential part of a juridical transaction which cannot have canonical effects without it. In the case of the renewal of religious vows when the temporary vows expire, the situation is presented as follows: "The religious," according to Regatillo, "breaks away from the institute when, after reporting to the Superior his will not to renew the vows, leaves the house."[66] But, supposing the religious in temporary vows informs his superior of his decision not to renew the vows and, as a matter of fact, does not renew them at the appointed time, but has not left the house, is there room for a change of mind? According to Coronata, the breaking away from the religious life had already taken place.[67] Regatillo affirms that the breaking has not taken place and therefore there is room for a change of mind. The reason he offers for this opinion is analogy with the interruption of the novitiate, according to canon 556, § 1. The writer believes that the religious, whose temporary vows have expired, could be admitted to their renewal any time during the day. The reason is not because he has not left the house, but because canon 34, § 3, 5°, allows the act to be performed any time during that day.[68]

The formal voluntary departure of which canon 637 speaks does not require any ratification or action on the part of the superiors.[69] No particular act is required of the religious himself, either.[70]

[64] Larraona, *CpR.*, 23 (1942), 86.

[65] Can. 556, § 1.

[66] *Institutiones*, I, 519.

[67] *Op. cit.*, I, 832.

[68] Cf. Coronata, *op. cit.*, p. 832.

[69] Goyeneche, *op. cit.*, II, 122; Coronata, *op. cit.*, p. 832.

[70] Tabera, *op. cit.*, p. 514.

It seems without logic to attach to the act of leaving the house a juridical significance nowhere stated in the law, only because such is the case in other instances. The foregoing explanation of the nature of the interruption of the novitiate and of the termination of temporary vows and their renewal should make it clear that, to transfer the requirements established by law for those cases by reason of analogy to the acceptance of the rescript of secularization and leaving the house, is not sufficiently justified. Positive law requires different essential formalities in each one of the three cases: 1) For interruption of the novitiate by dismissal, leaving the house is required; 2) No particular act is prescribed for free or voluntary departure at the expiration of temporary vows; 3) Acceptance is the final essential formality for a rescript of secularization to take effect.

One would think that the ten-day clause regarding the acceptance of a rescript of secularization means that the choice of the petitioner within the ten useful days determines the effect of the rescript; that is, if he makes a positive choice one way or another. A passive attitude will produce no legal results within the ten days. But the rule about the ten-day period supplies the lack of action when the petitioner did not act; after ten useful days, the rescript loses all legal value and the religious retains his religious status.

The acceptance of a rescript of secularization is not presumed; it must be an express act placed after notice has been received of the execution of the rescript. According to the practice of the Sacred Congregation of Religious, an implicit express acceptance is sufficient when circumstances remove all reasonable doubts about the intention of the petitioner.[71] Escudero recommends that it be an explicit act of acceptance and, better yet, in writing.[72] The best form of acceptance would certainly be in writing, or orally, before two witnesses.[73] A similar procedure is recommended for the act of declining the rescript within the ten days. Perhaps, in practice, it might be easier to let the ten days run out and thus let the rescript perish, unless quicker action be desirable.

[71] Gutierrez, *CpR.*, 32 (1953), 196.

[72] *Op. c.*, p. 268.

[73] Cf. canon 24.

Conclusion:

1) A rescript of secularization must be accepted by the religious before it can be operative.

2) The acceptance must be one following the granting and the execution of the rescript.

3) Superiors may delay the execution or the communication to the religious for a good reason and provided there is no fraud or malice in the delay.

4) If the religious does not act within ten useful days from the time he was given notice, the rescript becomes void.

5) A formal and definitive acceptance or rejection of the rescript, at any time during the ten useful days, is final, and there is no room for a change of mind regarding the juridical effects of the rescript.

6) Physical departure from the religious house has no bearing on the operation of the rescript of secularization.

7) If the religious declines to accept the rescript, and the Superiors wish to have him separated from the institute, whether it be of pontifical or diocesan right, they must have recourse to the Sacred Congregation of Religious, who will decide what is to be done.

Basil Frison, C.M.F.

Claretville
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Decrees and Decisions

CANONICAL

CANDLES FOR LITURGICAL USE

On December 13, 1957, the Congregation of Sacred Rites issued a decree permitting the Conferences of Bishops in each nation (or, where these are not held, the individual local Ordinaries) to determine the percentage of beeswax, olive oil or other vegetable oil required in candles for liturgical use, namely, the paschal candle, the two candles for Mass, and the candle used for the tabernacle lamp.

* * * * *

PRIESTS WITH DEFECTIVE SIGHT

The Congregation of Sacred Rites issued an Instruction, dated December 15, 1957, concerning the celebration of the *Missa de Beata* and the *Missa Defunctorum* by priests who have an indult from the Congregation by reason of very defective eyesight. This is a revision and simplification of the Instruction of January 12, 1921, which is found in the Roman Ritual (tit. V, c. 6). If the priest becomes totally blind, he must obtain a new indult from the Sacred Congregation for the Discipline of the Sacraments.

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INSTRUCTION ON CO-EDUCATION

A lengthy Instruction was issued by the Sacred Congregation for Religious on December 8, 1957, concerning the practice of co-education. The Instruction includes general principles according to which co-education may be sometimes tolerated, obligatory norms to be followed where circumstances necessitate co-education, and a listing of precautions to be taken.

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APPLICATION OF THE CONSTITUTION *SEDES SAPIENTIAE*

According to a Declaration of the Sacred Congregation for Religious, the question was presented whether the Apostolic Constitution *Sedes Sapientiae* (May 31, 1956) and the *Statuta Generalia* attached to it oblige and include those religious congregations and societies of the common life in which public vows are not taken. In an audience of July 30, 1957, the Holy Father answered the question affirmatively. With regard to the execution of these laws, however, the Sacred Consistorial Congregation and the Sacred Congregation *de Propaganda Fide* retain their competence over religious institutes and societies subject to them by law or apostolic privilege.

* * * * *

REPETITION OF THE BLESSING OF ASHES

By means of a decree of the Congregation of Sacred Rites, dated February 5, 1958, the Holy Father granted the following faculty to local Ordinaries: "to permit that the blessing of ashes, which according to the rubrics is to be performed once in the morning of Ash Wednesday before the principal Mass, be also repeated before an evening Mass in churches where the evening Mass is usually celebrated with a large gathering of the faithful."

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PROHIBITION OF NEW RITES

On February 14, 1958, the Supreme Sacred Congregation of the Holy Office reminded local Ordinaries that, in virtue of their right and duty according to canon 1261, § 1, they should not permit the introduction of new rites and ceremonies or lessons and prayers into divine offices or the subtraction of anything from divine offices without consulting the Apostolic See. The secular and regular clergy were warned to observe canons 1257 and 1259, §§ 1-2.

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PROMPT ADMINISTRATION OF BAPTISM

In view of the practice in some places of delaying the conferral of Baptism for reasons of convenience or of a liturgical nature—favored by "some opinions, lacking solid foundation, concerning the eternal salvation of infants who die without Baptism"—the

Holy Office reminded the faithful that infants should be baptized *quamprimum*, in accordance with canon 770. The Monitum, which was issued on February 18, 1958, asked that pastors and preachers urge the fulfillment of this obligation.

* * * * *

DECLARATION OF EXCOMMUNICATION

According to a Declaration of the Sacred Congregation of the Council, of February 15, 1958, three Hungarian priests—Recaredus Horwáth, Nicolaus Beresztóczy, and Ioannes Máté—have violated the prohibition of priests' seeking or exercising office in the Hungarian Parliament (July 16, 1957). The Sacred Congregation therefore declared that they had incurred the penalty attached to the prohibition, *latae sententiae* excommunication reserved in a special way to the Apostolic See. It is required for absolution that the priests effectively and definitively resign the offices in question and give certain signs of repentance.

* * * * *

NEW INDULGENCED PRAYERS

The Sacred Penitentiary, Office of Indulgences, has announced the following concessions, attached to three prayers composed by Pope Pius XII: an indulgence of one thousand days for the recitation of a special prayer by those who teach (December 28, 1957); an indulgence of one thousand days for the recitation of a second prayer by members of a Christian family (December 30, 1957); an indulgence of three years for the recitation of a third prayer by Catholic legislators and civil officials (January 26, 1958).

Frederick R. McManus

CIVIL

WIRE-TAPPING

New York law provided for warrants to be issued by the local courts permitting the police to tap the telephones of the persons listed in the warrant. All other types of wire-tapping were illegal, and could not be used in court as evidence. This New York Statute

was held to be in violation of Section 605 of the Federal Communications Act, and was hence invalid. In re Interception of Telephone Communications decided on January 1, 1958. New York Sup. Ct. N.Y. Ct.

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LABOR INJUNCTION

Following a strike which had been long and bitter, a contract was finally signed which had a non-reprisal agreement clause. Neither the union nor the management was to take any action against any person as a result of the strike. When the union charged one of its members with " conduct unbecoming a union member " for failure to cooperate in the strike, the company sued the union to halt the union proceedings by a court injunction. The court held that the company was a party to the contract, and could insist on its enforcement in any matter covered by the contract. The injunction was granted, and the union ordered to cease the charges brought against the non-striking member. Republic Aviation Corp. vs. Republic Lodge No. 1987 decided on December 31, 1957. New York Sup. Ct., Queen City.

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INCOME TAX RETURNS

Plaintiff in a civil suit for loss of earnings objected to the introduction of his income tax returns to prove that he had suffered no loss of earnings during the alleged period of time. The New Hampshire Supreme Court held that income tax returns were not privileged as a matter of law. Currier vs. Allied New Hampshire Gas Company decided December 31, 1957.

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FINGER PRINTING

The petitioner was convicted of speeding in violation of New Jersey traffic laws. In the normal process of handling the violation the petitioner was fingerprinted and mugged. After conviction the petitioner asked that his fingerprints and photograph be removed from the record and given to him in view of the fact that a speeding violation was not usually considered a crime. In the case of Roesch vs. Ferber decided December 30, 1957 the New Jersey Superior Court App. Div. held that neither by statute nor common law was the petitioner entitled to the return of the fingreprints and photo-

graphs which were taken. There was no violation of his constitutional rights.

* * * * *

RIGHT OF PRIVACY

Defendant publishing company printed a picture of a homicide victim in a recent murder case. The family of the victim objected to the appearance of the picture in the defendant's detective-story magazine. A factual account of the incident accompanied the picture. The court held that the defendant had not invaded the right of privacy of the victim's family by the publication of the picture and the story. Jenkins vs. Dell Publishing Company. Third Circuit Court of Appeals decided January 13, 1958.

* * * * *

FREEDOM OF SPEECH

The NAACP, a New York corporation operating in Virginia, was held to be a person under Virginia law. The Virginia statute required the plaintiff to register and furnish lists of members, a financial statement, and an itemized list of contributions. The United States District Court for Eastern Virginia held that the Virginia statute was unconstitutional because it violated the Fifth and Fourteenth Amendments to the Federal Constitution. NAACP vs. Patty decided January 21, 1958.

* * * * *

PRIVATE CHARITIES

The Supreme Court of Pennsylvania held that a private charity established for poor, white, male orphans was not discrimination on the part of the testator. An individual has the right to set up a private charity for any legal purpose he may choose. The substitution of trustees will not affect this right. Gerard's Estate decided January 24, 1958.

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INSANITY

The Utah Supreme Court has held that the question of insanity is one of law and not of psychiatry. The legal test is whether the defendant understood the nature of his act, or did not know it was wrong, or was unable to control his actions or impulses. Decided February 1, 1958.

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DISCRIMINATION

A Louisiana statute gives the principal of a high school and the county school superintendent the power to deny entry to a college or university conducted by the state of Louisiana. This statute was designed to enable the colleges and university of Louisiana to prohibit the entrance of negroes. The Circuit Court of Appeals of the Fifth Circuit held this Louisiana statute to be unconstitutional. Board of Supervisors of Louisiana State University vs. Ludly decided February 13, 1958.

JOHN J. MCGRATH

Book Reviews

NORMAE GENERALES DE PERSONIS. By Ludovicus Bender, O.P. Desclée, Roma, 1957. Pp. 232.

POTESTAS ORDINARIA ET DELEGATA. By Ludovicus Bender, O.P. Desclée, Roma, 1957. Pp. 207.

These volumes form a commentary upon two important series of canons of the Code, 87-106 and 196-209, respectively. Their author is a professor at the Angelicum and is known for other works, for example, on the philosophy of law and on public ecclesiastical law.

Canons 87-106 are not *normae generales* in any absolute sense, as is the case with the canons of Book I of the Code. As the author explains, however, they are general norms in relation to the law *De Personis* and are of great significance throughout that law.

The matter is treated in nine chapters, of which one or two are very brief because of the limited nature of their subjects. Questions of domicile and quasi-domicile are considered at length, with reference to the background of the present law. The subject matter of Canons 103 and 104 (acts vitiated by force, fear, etc.) is simply and clearly explained. In Chapter VIII, with reference to acts of superiors which require consent or counsel, the author argues forcefully that canon 105 establishes no norm of invalidity of acts if a superior fails entirely to seek consent.

While this book, *Normae Generales de Personis*, was in preparation, the corresponding canons for the Oriental Churches appeared. It is unfortunate that Father Bender was not able to devote more space to them, although he has added a brief appendix (pp. 221-228) on the subject.

The second of these books is a commentary on Title V of Book II of the Code, with the exception of Canon 210. The first two chapters deal with the matter of Canons 196-198, together with related definitions and divisions (for example, the *potestas dominativa* and the *potestas assistendi matrimoniis*). In succeeding chapters Father Bender treats of delegation and subdelegation (Canon 199), interpretation and proof of the power of jurisdiction (200), exercise of

the power of jurisdiction (201), restriction on the exercise of power (202), and so on through the other canons.

Two important chapters are concerned with supplied jurisdiction according to Canon 209 and the specific problem of the delegated power to assist at a marriage. The author insists, with regard to the common error mentioned in Canon 209, that ignorance is not to be identified with error, that ignorance is not properly speaking the cause of common error in the sense of the canon, and that there must be, for the operation of the canon, an explicit error concerning the existence of the jurisdiction which is to be supplied. He asserts and argues that the error must be one of fact not a mere *error de iure;* at the same time he denies that a true *dubium iuris* exists regarding this aspect of Canon 209. To conclude this chapter he gives a lengthy commentary on the meaning of positive and probable doubt.

In Chapter X Father Bender makes the important application of the principles of delegated and subdelegated power to the question of assistance at marriage. The final chapter is concerned with the necessity of notification and acceptance of delegation.

Both of these volumes are valuable, carefully reasoned studies of their respective subjects. Both have alphabetical indices, *Potestas Ordinaria et Delegata* an index of canons as well; neither contains a bibliography.

A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW. Stanislaus Woywod, O.F.M. Revised and Enlarged Edition of Combined Volumes I & II. Callistus Smith, O.F.M. Joseph F. Wagner, New York, 1957. Vol. I, pp. xviii-833; Vol. II, pp. 929.

This latest edition of the Woywod-Smith commentary has certain additions, intended to bring it up to date. These are found chiefly in the appendices to Volume II. They include a few documents from the Holy See, such as the text of the Constitution *Christus Dominus.*

The book retains the advantages of the earlier editions. It covers the entire Code of Canon Law, giving at least the text of the canons of Books IV and V which are ordinarily neglected in English commentaries.

Unfortunately little revision has been done. Many of the matters added to the appendices should be incorporated in the body of the text. For example, there is no indication under the pertinent canons of the legislation of 1953 or 1957 on the Eucharistic fast (I, 467-472). Many significant decrees or decisions are omitted entirely, e.g., the declarations concerning alienation in 1952 and 1953 by the Sacred Consistorial Congregation and the Sacred Congregation for Religious, respectively. Others are inadequately introduced, e.g., the penalty (March 22, 1950) in connection with canon 142, which is mentioned under canon 2380 but not found in the list of excommunications (II, 639).

The index does not appear to have been corrected to agree with the added material, nor has the bibliography been brought up to date. No volume published after 1944 is found in the bibliography.

FREDERICK R. MCMANUS

Chronicle

The Sacred Roman Rota reports that it has rendered 204 decisions in the course of the year 1957. Of these decisions, 199 were concerned with matters regarding matrimony and 94 annulments were granted.

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Msgr. William McManus, Superintendent of the Chicago Archdiocesan School Board, received an honorary degree at De Paul University commencement exercises.

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Funeral services for the Very Rev. Casimir Zakrajsek, O.F.M., founder of St. Mary's Seminary, Lemont, were held on January 30.

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On March 20, Vice President of the United States, Richard M. Nixon, paid a visit to the Cardinal Archbishop of Chicago and said that the appointment of His Eminence to the Roman Curia was an honor to the American Catholic Church.

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Chaplain (Rear Admiral) George A. Rosso, has been named Chief of Navy Chaplains effective in June. Father Rosso is a priest of the Archdiocese of New York.

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On the feast of St. Benedict (March 21), His Eminence Samuel Cardinal Stritch of Chicago received the Unitas Medal from the Most Rev. Ambrose Ondrak, O.S.B., in recognition of His Eminence's pre-eminent contribution to the extension of Catholic Unity.

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On March 17, His Excellency, the Most Reverend Amleto G. Cicognani, Apostolic Delegate to the United States of America, celebrated the twenty-fifth anniversary of his appointment to the important post of papal representative to the United States of America.

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Coadjutor Bishop Hubert Cartwright of Delaware died on March 6 of a heart attack.

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It was announced on March 1 that His Eminence, Samuel Cardinal Stritch, Archbishop of the Archdiocese of Chicago, has been appointed Pro-Prefect of the Sacred Congregation for the Propagation of the Faith by His Holiness, Pope Pius XII. His Eminence will leave New York City for Rome on April 17.

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Bishop-elect James Ryan, O.F.M., will be consecrated Bishop on April 9 by His Eminence, Cardinal Stritch. Bishop-elect Ryan is Prelate *Nullius* of Santarem, Brazil.

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Bishop McNamara of Joliet, Illinois, celebrated the ninth anniversary of his consecration as a Bishop on March 7.

ROMAEUS W. O'BRIEN, O.Carm.